

Office & Professional Employees International Union, Local 29, AFL–CIO (Dameron Hospital Association) and Alexandria M. Stoppenbrink. Cases 32–CB–3695 and 32–CB–3801

May 12, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND BRAME

On June 9, 1993, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed cross-exceptions and supporting briefs. The Charging Party also filed an answering brief in opposition to the Respondent's exceptions.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions except as modified below and to adopt the recommended Order as modified and set forth in full below.¹

¹ Charging Party Stoppenbrink excepts to the judge's failure to recommend that the Respondent reimburse her for all service fees collected from her since her resignation from membership and filing of an objection under *Communications Workers v. Beck*, 487 U.S. 735 (1988). Contrary to the Charging Party's contention, we find that the Respondent was still entitled to collect fees for expenses related to representational activities. See *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 fn. 4 (1995), rev'd. on other grounds *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated 525 U.S. 979 (1998). Consistent with our finding, discussed below, that the Respondent violated Sec. 8(b)(1)(A) of the Act by failing to escrow the Charging Party's service fees in accordance with the terms of its dues-objection policy, we adopt the judge's remedial recommendation that the Respondent should escrow the full amount of Stoppenbrink's reduced service fees and issue an amended policy that complies with *Beck*.

Although the judge referred to "objections" and "challenges" interchangeably in his decision, these terms designate distinct phases in the process by which a nonmember unit employee opposes paying dues and fees required under an applicable union-security clause. We have therefore corrected the judge's recommended Order and provided a new notice that reflects these corrections. We have also modified the judge's recommended Order and provided a new notice to conform to the violations found.

Our dissenting colleague disagrees with the Board's application of the duty of fair representation standard in dues objection cases. The Board considered the issues raised by our colleague in deciding *California Saw & Knife Works*, 320 NLRB 224 (1995), where it held that a union's fulfillment of its obligations under *Beck* are subject to the duty of fair representation. The Seventh Circuit enforced in full the Board's decision in *California Saw & Knife. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). Neither the Seventh Circuit, nor the other circuit courts that have reviewed subsequent Board cases applying the duty of fair representation to a union's obligations under *Beck* has called this standard into question. See *Machinists v. NLRB*, supra, 133 F.3d at 1015–1016 ("The Board evaluated these [*Beck*] procedures . . . in terms of their conformity to the general norm of reasonableness that is implicit in the concept of 'fair' representation."); *Ferriso v. NLRB*, 125 F.3d 865, 868 (D.C. Cir. 1997) (according the NLRB "the usual measure of *Chevron* [467 U.S. 837, 843 (1984)] deference in matters relating to the duty of fair representation"), denying enf. 322 NLRB 1 (1996); *Finerty*

The complaint alleged that the Respondent breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act by promulgating and maintaining policies inconsistent with the requirements of *Communications Workers v. Beck*, supra, regarding the right of nonmember unit employees to object to the expenditure of dues for activities unrelated to collective bargaining, contract administration, and grievance adjustment. The Respondent established a *Beck* policy and an amended policy, respectively, in June and November 1991.² Charging Party Stoppenbrink received copies of each *Beck* policy and resigned from the Union sometime in 1991. After Stoppenbrink objected to paying union dues and fees for nonrepresentational activities, the Respondent reduced her financial obligation based on past expense allocations. The Respondent also sent Stoppenbrink its 1991 chargeable expense report that listed the major categories of expenses for the Respondent and for the International Union's expenditure of the Respondent's affiliation fees.³ For each category, the report specified the total expenditure and the portion of that amount spent on nonchargeable activities. The complaint allegations discussed below pertain to the Respondent's procedures for challenging its dues-reduction figures.

1. The judge found that the Respondent violated Section 8(b)(1)(A) by requiring employees to challenge specific expense categories on its chargeable expense re-

v. NLRB, 113 F.3d 1288 (D.C. Cir. 1997), enf. 322 NLRB 142 (1996); *Weyerhaeuser Paper Co.*, supra, 320 NLRB 349. Contrary to our dissenting colleague, the *Beck* decision did not preclude the Board from applying a duty of fair representation analysis. As the Court of Appeals for the Seventh Circuit explained in affirming the Board's decision in *California Saw, Beck* implicates the nondirective statutory language of Sec. 8(a)(3), and "the Board has broad latitude in interpreting nondirective statutory language. . . . Less directive than section 8(a)(3), so far as agency fees is concerned at any rate, it is scarcely possible to get. . . . All the details necessary to make the rule of *Beck* operational were left to the Board . . . [of] crafting the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees." 133 F.3d at 1015 (citations omitted).

² No exceptions were filed to the judge's finding that the Respondent's January 1991 policy violated Sec. 8(b)(1)(A) by requiring employees to communicate with the Union by certified mail and by maintaining a charge and rebate system that failed to provide for an immediate dues reduction for objectors. We note that the latter finding is consistent with the Board's finding in *California Saw*, supra, 320 NLRB at 248–249, that a union violates its duty of fair representation by charging employees for nonrepresentational expenses after their status as *Beck* objectors is perfected.

In analyzing the Respondent's failure to provide an immediate dues reduction, the judge discussed the applicability of cases under the Railway Labor Act (RLA) to *Beck* issues arising under the National Labor Relations Act. With respect to this issue, the Board in *California Saw & Knife* found that union-security clauses negotiated between a private union and a private employer pursuant to Sec. 8(a)(3) of the Act do not involve state action. The Board majority therefore concluded that "public sector and RLA precedents premised on constitutional principles are not controlling in the context of the NLRA." 320 NLRB at 226.

³ In light of the judge's finding that the certified mail requirement rendered unlawful the entirety of the Respondent's challenge procedure, we do not pass on his discussion in fn. 5 of his decision as to whether challenging employees could be required to attend a "Resolution Conference" as a condition to having their challenges processed.

port—thereby foreclosing challenges to its dues-reduction figures in general—and by failing to escrow the full amount of the reduced service fees paid by Charging Party Stoppenbrink since she became an objector. Each of the Respondent’s *Beck* policies provided that the Respondent would treat the failure to submit challenges that specified a category of expenditures as a waiver of the right to challenge the expenditures. The policies further provided that upon receipt of a specific challenge, the Respondent would deposit the portion of dues and fees that represented the challenged amount in an interest-bearing escrow account. Thereafter, the challenger could request arbitration to resolve the dispute.

By letter dated January 9, 1992, Stoppenbrink challenged “all expenditures that are listed in your ‘financial report’” and stated, *inter alia*, that she would not participate in the dues-objection policy’s arbitration procedure (emphasis in original). Because of the Charging Party’s failure to identify individual expense categories in her challenge, the Respondent maintained that there was no dispute over fee expenditures and that it therefore had no obligation to escrow her service fees. For the reasons set forth below, we find, in agreement with the judge, that the Respondent violated its duty of fair representation as alleged in the complaint.

A union breaches its statutory duty of fair representation when its conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith.⁴ On careful consideration, we agree with the judge that the Respondent’s requirement that an objector specify each expense category that he contends has been improperly allocated between chargeable and nonchargeable activities arbitrarily restricted employees’ rights under *Beck* to challenge a union’s dues-reduction figures. In so holding, we emphasize the context of this specificity requirement. The Union’s policy provided that a failure to identify a specific expenditure as improperly allocated would be considered as a waiver of any challenge to that expenditure. Accordingly, the Union treated Stoppenbrink’s general challenge as a total waiver of her right to challenge union expenditures and failed to place the challenged amounts of Stoppenbrink’s reduced fee, *i.e.*, the entire amount, into escrow. Thus, a specific challenge was not simply a condition of escrow, it was effectively a condition of the right to invoke the challenge process itself.

As the judge discussed, the information provided by the union to an objector need not be so detailed that an employee can make the ultimate determination at that point as to whether the union’s reduced fee is correct. The Board in *California Saw & Knife* found that the union’s provision of information that disclosed “the major categories of union expenditures,” like those the Respondent set forth on its chargeable expense report, provided

“sufficient information to enable objectors to determine whether to challenge the dues-reduction calculations, and accordingly satisfies the duty of fair representation.”⁵ Because the union is required only to provide the objector with “major categories” of expenditures and a breakdown of each into “representational” and “nonrepresentational” categories, the nonmember objector may not have sufficient information to decide whether a specific expenditure is incorrectly allocated. By requiring an objector to analyze its chargeable expense report for precise inaccuracies or misallocation within or between general expense categories in order to single out individual categories for submission of a specific challenge (even though the objector may lack sufficient information to formulate such a challenge), the Union simply places too high a burden on the objector’s exercise of her right to challenge the Union’s figures.

In this context, we find that it was unreasonable and arbitrary for the Respondent, at this stage of the dues-objection process, to treat as a nullity challenges contending, as a general matter, that the Union overstated its chargeable expenses. Because the Union’s refusal to escrow was part and parcel of its refusal to accept the general challenge, we also hold that it was a breach of the union’s duty of fair representation to refuse to place the challenged amount—*i.e.*, the entire amount—into escrow in accordance with its established escrow policy. We do not, however, pass on the broader issue whether the duty of fair representation requires a union to place disputed amounts into escrow pending resolution of challenges to its dues-reduction calculation. That issue is not presented in this case. We also do not pass on whether the Union could maintain a policy under which all challenges, whether specific or general, would be accepted and processed, but placement of disputed funds into escrow would be subject to submission of a specific challenge. That issue is also not presented here.

The Respondent contends that its specificity requirement is reasonable in this case because the Charging Party has rejected arbitration, and thus if the Union did not require her to specify her challenge, the Union would be required to escrow the full amount of her reduced service fees indefinitely. That would be tantamount, the Respondent argues, to a determination that all of its expenses are nonchargeable and would undermine its right to collect service fees for expenses related to representational activities. The Respondent also contends that the Board is barred from enforcing the recommended escrow remedy because of the Charging Party’s refusal to exhaust available and lawful arbitration procedures. In rejecting this argument, we again emphasize that the unreasonableness of the Union’s policy in this case was that it treated a general challenge to its dues reduction calculation as a complete waiver of the objector’s *Beck* rights

⁴ *California Saw*, *supra*, 320 NLRB at 229, citing *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

⁵ *Id.* at 239.

and, accordingly, refused to escrow the disputed amounts pursuant to its established escrow policy.

In any event, even assuming that the Charging Party actually rejected arbitration,⁶ escrowing the amounts she has challenged would not result in an “indefinite escrow” or undermine the Union’s right to collect and use service fees for representational activities. The Respondent’s own November 1991 *Beck* policy provides an alternative means to resolve disputed costs allocations. That policy states in pertinent part:

You will be entitled to obtain neutral arbitration of your protest by filing a Notice of Request for Arbitration with your protest. *If you do not file a Notice of Request for Arbitration with your protest, your protest will be submitted to the Local 29 Executive Board for resolution, whose decision will be final.* [Emphasis added.]

Thus, even if an objector refused to arbitrate, funds collected from that objector would not remain in perpetual escrow, because the authority to resolve the protest would devolve back to the Respondent’s executive board, and once the executive board resolved the dispute the disputed fees would be released from escrow. Thus, the Respondent’s contention that striking down its “specificity” requirement will allow objectors who reject arbitration to become “free riders” for an indefinite period of time is simply not correct, under its own policies.

For all these reasons, we hold that the Union violated the duty of fair representation in violation of Section 8(b)(1)(A) by refusing to accept Stoppenbrink’s challenge, and refusing to place the disputed amounts into escrow pursuant to its escrow policy, because she did not specify the particular categories of expenses that she was challenging.

2. As noted above, after Stoppenbrink filed her objection to the use of her dues for nonrepresentational purposes, the Respondent, as required by *California Saw*, furnished her with its chargeable expense report which listed its major categories of expenditures and specified which were chargeable or nonchargeable. The General Counsel and the Charging Party except to the judge’s dismissal of the complaint allegation that the financial disclosure unlawfully failed to explain one of the listed expenditures entitled “General and Defense Funds Reserve.” We find no merit in the exceptions.

As discussed above, the Board in *California Saw & Knife* found that unions are not obligated to disclose all of their expenditures in their *initial* response to the filing of *Beck* objections; rather, unions are required only to identify their *major* categories of expenditures, broken down into chargeable and nonchargeable allocations. The Respondent’s financial disclosure clearly does this.

There is no contention that the Respondent unlawfully failed to supply Stoppenbrink with a listing of all its major

categories of expenditures or that the listing unlawfully identified a chargeable expense which is claimed to be nonchargeable. Rather, the complaint’s sole allegation is that one item in the financial disclosure is ambiguous. That item, however, the general and defense funds reserve, was not one of the Respondent’s major categories of expenditures. Rather, as plainly set forth in its chargeable expense report, the General and Defense Funds Reserve was a sub-category of the International’s expenses, funded by the affiliation fee paid to the International by the Respondent. Affiliation fees to the International were one of the Respondent’s major categories of expenses and were clearly identified in its chargeable expense report. No further disclosure was required under *California Saw*.⁷

Thus, by further breaking down the International’s expenditures of the Respondent’s affiliation fee into sub-categories, including the amount designated by the International as its General and Defense Funds Reserve, the Respondent went beyond what was legally required.⁸

Even assuming, arguendo, that the Respondent was obligated to disclose the International’s expenditures, we reject the complaint allegation that the General and Defense Funds Reserve was unlawfully ambiguous. “The information to be provided to objectors need only be sufficient to enable them to determine whether to challenge the Union’s figures.” *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB 28, 30 (1999). We do not find the disputed expenses here so ambiguous or otherwise insufficient to preclude an objector from determining whether to file a challenge. Indeed, Stoppenbrink filed a challenge questioning this expenditure.⁹

We conclude, therefore, that the Respondent did not violate its duty of fair representation by failing, at the prechallenge stage, to explain the International’s General and Defense Funds Reserve expense set forth in its chargeable expense report submitted to Stoppenbrink.

⁷ The Report sets forth eight major categories that comprise the Respondent’s expenses. The amount of the affiliation fee that the Respondent sends to the International is \$239,971.11. Of this amount, the International allocates \$36,714.68 to its General and Defense Funds Reserve, which constitutes approximately 15 percent of the International’s total expenditures of the Respondent’s affiliation fee and 3 percent of the Respondent’s total expenditures. The Report further shows that the International divides the \$239,971.11 among nine other expenditures, in addition to the one at issue here.

⁸ The Board, in *Teamsters Local 166 (Dyncorp Support Services)*, supra, 327 NLRB 950 (1999), confirmed that a union need not break down in its initial response to an objection how its affiliate spent its affiliation fees. We recognize that the D.C. Circuit disagreed with the Board in *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). To the extent that the court would require a union to break down affiliation fees into major spending categories (of the affiliate) and to identify what portion of the affiliate’s expenditures are chargeable or nonchargeable, we need not reach that issue here. In fact, the Respondent did break down its affiliation fees in this manner in the expense report it sent to Stoppenbrink.

⁹ As set forth in the judge’s decision, the Respondent did eventually explain the International’s General and Defense Funds Reserve, but the explanation was not provided until after the complaint was filed and, then, only to the General Counsel.

⁶ We find it unnecessary to pass on the judge’s finding that the issue of whether the Charging Party rejected arbitration was not “ripe” for review.

Accordingly, we affirm the judge's dismissal of this aspect of the complaint.¹⁰

3. The General Counsel and the Charging Party except to the judge's finding that the Respondent did not violate Section 8(b)(1)(A) of the Act by allocating its chargeable expenses on a "Local-wide" and "International-wide" basis rather than on a unit-by-unit basis.¹¹ The Board in *California Saw* found that the duty of fair representation does not require a union to calculate, allocate, or disclose its chargeable expenses on a unit-by-unit basis.¹² We accordingly adopt the judge's dismissal of this allegation.

The Respondent excepts to the judge's finding that it violated Section 8(b)(1)(A) of the Act by charging Stoppenbrink for litigation expenses incurred by another bargaining unit. We find merit in the Respondent's exceptions.

In *California Saw*, the Board held that a particular union expense attributable to activities outside an objector's bargaining unit may properly be charged to objectors only if it is (1) "germane to the union's role in collective bargaining, contract administration and grievance adjustment" and (2) incurred "for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" 320 NLRB 224 at 239, quoting *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 524 (1991). The General Counsel's sole contention is that litigation expenses are per se nonchargeable as nongermane to the Respondent's role as a collective-bargaining representative. The Board rejected this per se argument in *California Saw* and we do so here. Accordingly, we reverse the judge and dismiss the allegation that the Respondent violated

Section 8(b)(1)(A) by charging Stoppenbrink for extra-unit litigation expenses.¹³

ORDER

The National Labor Relations Board adopts the Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Office & Professional Employees International Union, Local 29, AFL-CIO, Oakland, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, or publicizing an objecting nonmember service fee reduction policy that fails to provide for the immediate reduction in dues and fees for nonmembers who file proper objections to the Respondent's expenditure of their dues for nonrepresentational purposes pursuant to *Communications Workers v. Beck*, 487 U.S. 735 (1988).

(b) Maintaining an objecting nonmember service fee reduction policy that requires employees to communicate with the Union by certified mail.

(c) Maintaining an objecting nonmember service fee reduction policy that provides for a charge and rebate system delaying reduction of objecting employees' service fees.

(d) Maintaining an objecting nonmember service fee reduction policy that requires employees to make specific as opposed to general challenges to the Union's cost allocations.

(e) Refusing, because an objector files an general instead of a specific challenge, to immediately deposit the amount of the disputed fees into an interest-bearing escrow account, as provided for in its nonmember service fee reduction policy, on receipt of an objector's specific or general challenges.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Amend its nonmember service fee reduction policy to delete any provision that fails to provide for the immediate reduction in service fees upon receipt of a proper *Beck* objection.

(b) Amend its nonmember service fee reduction policy to delete any provision that requires employees to communicate with the Union by certified mail.

(c) Amend its nonmember service fee reduction policy to delete any provision establishing a charge and rebate system.

(d) Amend its nonmember service fee reduction policy to delete any requirement that employees file specific as opposed to general challenges to the Union's cost allocations.

¹⁰ The Charging Party argues separately in her brief that the Respondent unlawfully failed to specify *how* the General and Defense Funds Reserve was allocated between chargeable and nonchargeable activities. Aside from the fact that this argument was not a part of the General Counsel's theory of the complaint and, hence, is not properly before us, we disagree with the Charging Party. As stated in *Teamsters Local 443 (Connecticut Limousine)*, 324 NLRB 633, 635 (1997), and *Teamsters Local 166 (Dyncorp Support Services)*, *supra*, questions regarding how a union has calculated its dues reduction figure are appropriate for the final stage of the *Beck* objection process, i.e., the challenge stage which Stoppenbrink has invoked here. Thus, we find ourselves at odds with the D.C. Circuit's decision denying enforcement of the Board's *Dyncorp* decision, see *Penrod v. NLRB*, *supra*, 203 F.3d 41, which would appear to require unions in their *initial* response to an objection to establish finally and definitively, with facts and figures, that their expenditures are chargeable to the degree asserted. In rejecting this approach, we emphasize that our disagreement with the court centers not on the *amount* of financial information that must be disclosed but, rather, on *when* it must be provided.

¹¹ This complaint allegation pertained to each of the Respondent's *Beck* policies.

¹² 320 NLRB at 237. The Board reasoned that if an objector does not accept a union's assertion that it calculated and/or allocated its expenses so that only those that ultimately inure to the benefit of the bargaining unit are being charged, the objector may challenge that assertion under the procedures set forth in the Union's *Beck* policy.

¹³ *Id.* In view of our finding, we reject the Charging Party's contention that the Respondent should be required to reimburse her for that portion of her fees spent on nonunit litigation expenses.

(e) Deposit all service fees from Alexandria M. Stoppenbrink that are brought into dispute by her general challenge to the Union's cost allocations into an interest-bearing escrow account, including an amount equal to the interest that would have accrued had such fees been timely escrowed.

(f) Publish and disseminate its amended nonmember service fee reduction policy.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of money to be placed in escrow under the terms of this Order.

(h) Within 14 days after service by the Region, post at its union hall offices copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Within 14 days after service by the Region, sign and return sufficient copies of the Notice for posting by Dameron Hospital Association, if willing, at all locations where notices to Dameron Hospital Association's unit employees are customarily posted.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

MEMBER BRAME, concurring in part and dissenting in part.

I.

A. Introduction

This case involves the Union's unlawful response to Alexandria Stoppenbrink's exercise of her right, under Section 7 of the National Labor Relations Act (NLRA or the Act),¹ to refrain from union activities when working under a union-security provision.²

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ Below are the provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151-169) that are pertinent here:

Sec. 7 provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected

Section 8(a)(3) of the National Labor Relations Act permits parties to a collective-bargaining agreement to

by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a)(3) provides in relevant part:

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Sec. 8(b) provides in relevant part:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .

Sec. 9(a) provides in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Sec. 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) provides in relevant part:

(a) Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

(b) Any labor organization which represents employees in an industry affecting commerce . . . may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . .

² A union-security provision is a provision in a collective-bargaining agreement by which an employer and a union agree that, as a condition of employment, all unit employees must satisfy a "membership" or financial obligation to the union. See text of the first proviso to Sec. 8(a)(3), *supra*, fn. 1 (hereafter the 8(a)(3) proviso).

An "agency shop" is a contractual arrangement requiring every employee represented by a union, even though not a union member, to pay to the union, as a condition of employment, a service charge equal to the amount of union dues and initiation fees uniformly required of union members. In 1947, Congress, in the Taft-Hartley amendments to the Wagner Act of 1935, by the current Sec. 8(a)(3), outlawed the closed union shop, in which all employees were required to acquire and maintain full membership in their labor organization. Thus, the type of limited union security arrangement permitted in Sec. 8(a)(3) is, in essence, an agency shop. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) ("membership" requirement under Sec. 8(a)(3) has been "whittled down to its financial core").

provide that all employees in a bargaining unit must compensate the union for providing exclusive bargaining representation. In *Communications Workers v. Beck*,³ the Supreme Court held, among other things, that Section 8(a)(3) does not permit a union to expend funds, exacted from nonmember employees who object, on activities not related to the union's functions as the exclusive bargaining representative. The Court defined these functions as collective bargaining, contract administration, and grievance adjustment.⁴ In so holding, the Court drew upon a well-developed body of law respecting the limited authority of an exclusive bargaining representative under section 2, Eleventh of the Railway Labor Act (RLA)⁵ to exact financial support from objecting nonmembers. The Court found that Congress enacted the 8(a)(3) proviso to accomplish the same purposes as section 2, Eleventh of the RLA: "to remedy the inequities posed by 'free riders' who would otherwise unfairly profit from the Taft-Hartley Act's abolition of the closed shop."⁶ In restricting a union's power to exact funds from objectors under the Act, the *Beck* Court drew in particular upon its analysis of the scope of section 2, Eleventh in *Machinists v. Street*,⁷ an RLA case that it found controlling in the NLRA context. The Court had earlier found *Street* controlling in another context: the constitutional limitations on the "fair share" payments exclusive bargaining representatives in the public sector could extract from nonmembers.⁸

As I will discuss fully below, the Court has accorded virtually identical treatment to cases arising under section 2, Eleventh of the RLA and those arising under state statutes enabling public sector unions to bargain for union-security provisions. In the RLA and state public sector cases, the

Court had recognized that allowing a collective bargaining representative to require fees from nonmembers pursuant to both the RLA and state statutes "imping[ed] upon associational freedom," and justified this impingement on employee freedom only by the same "important government interests."⁹ In *Beck*, it extended this treatment to cases arising under the Act. Thus, *Beck* integrated union security law under the Act into a broader body of law dealing with union security where a union has the statutory role of exclusive bargaining representative and the accompanying duty to represent all employees fairly.

In *California Saw & Knife Works*,¹⁰ however, the Board ignored the standards worked out in the Court's rulings, and instead held that it would apply a far less demanding duty of fair representation standard¹¹ to allegations that a union had abused its limited authority under the 8(a)(3) proviso. In so doing, the Board confused a condition precedent for a permissible legislative judgment that union security fosters labor peace—the obligation to represent all unit employees, union and nonunion alike—with the standard of conduct for evaluating a union's extraction of fees from nonmembers. The Board took a standard used to measure a collective-bargaining representative's perform-

⁹ *Id.* at 225.

¹⁰ 320 NLRB 224, 248–249 (1995), supplemental decision, 321 NLRB 731 (1996), enf. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

¹¹ The duty of fair representation is a judicially imposed legal obligation on bargaining representatives, originally developed under the Railway Labor Act, which holds that a union, as the exclusive representative of all employees in a unit, owes each employee, whether or not a union member, a duty to exercise honesty of purpose and good faith with respect to statutory activities. See, e.g., *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); applied to the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). The duty of fair representation is the corollary of the power an exclusive representative holds over the work lives of represented employees. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Further, it constitutes an accommodation of a union's need to exercise discretion in carrying out its bargaining obligations and the right of represented employees to fair, rational, and nondiscriminatory treatment by their bargaining representative. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.*, 345 U.S. at 338. A union breaches its duty of fair representation through conduct that is "arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190.

Ford and Vaca arose under Sec. 301 of the Labor Management Relations Act (see fn. 1, supra, for text), which accords Federal courts jurisdiction over suits by and against labor organizations, including employees' suits alleging a breach of the union's duty of fair representation. A suit brought under Sec. 301 against a union does not provide employees with a remedy for violations of Sec. 8(b)(1)(A).

Fourteen years after the passage of the Taft-Hartley amendments, the Board found that that duty of fair representation was enforceable through an unfair labor practice proceeding alleging a violation of Sec. 8(b)(1)(A). *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). The Board derived the right from the Sec. 7 right to "bargain collectively through representatives of [the employees'] own choosing," and concluded that Sec. 8(b)(1)(A) "prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." *Id.*

³ 487 U.S. 735 (1988).

⁴ *Id.* at 745. These three functions will be referred to as the "Beck trio," representational activities, or chargeable activities.

⁵ 45 U.S.C. § 152, subdivision Eleventh (sec. 2, Eleventh). Congress added this section to the RLA in 1951 to permit railway unions to negotiate union-security provisions. Sec. 2, Eleventh provides in relevant part:

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

⁶ 487 U.S. at 753–754.

⁷ 367 U.S. 740 (1961).

⁸ *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977).

ance of the difficult task of reconciling conflicting interests within the bargaining unit and applied it to the quite different issue of a union's assertion of its interest qua union against dissenting nonmembers. This error has caused the Board to strike an incorrect balance between the statutory rights of nonmember objectors and the derivative interest of a labor organization in demanding financial support from nonmembers.

The Board today replicates this misreading of *Beck*. Thus, I write at length to explicate the holding in *Beck*, to illustrate the dangers of applying the less rigorous duty of fair representation standard to the statutory rights of employees, and to offer a more appropriate mode of analysis for protecting the rights of dissenting nonmembers.

In *Beck*, the Supreme Court enlarged the previous administrative and judicial scope of the right of employees to refrain from union activities when working under a union-security clause. After *Beck*, employees working under the Act enjoy a number of rights possessed for some time by workers not covered by the Act. As explained fully below, among other rights, employees covered by the Act are entitled to information about their rights, obligations, and options under a union-security clause and about the union's expenditures of funds. Thus, if employees choose nonmembership in the union, they have the right to object to the expenditure of the equivalent of dues and fees for nonrepresentational activities, receive an immediate reduction if the union makes such expenditures, and challenge the amount of their remittance to the union. The new articulation in *Beck* of the scope of union authority under the 8(a)(3) proviso meant that the Board's interpretation of Section 7, Section 8(a)(3), and Section 8(b)(1)(A) would require profound alteration.

The complaint here alleges as unlawful aspects of the Union's policy covering unit nonmembers' objections to subsidizing activities other than the "*Beck* trio," and challenges to the Union's financial report of the proportions of fees and dues spent on representational and nonrepresentational activities.¹² To remedy the violations of Section 8(b)(1)(A) that it has found, the Board majority, among other things, orders the Union to revise its dues objector policy to conform with *Beck* and the Board's interpretation of it in *California Saw & Knife Works*. As noted above, the Board there held that a union breaches its duty of fair representation when it violates an employee's *Beck* rights, and applied a duty of fair representation analysis to complaint allegations relating to those rights.

Under Section 7, the right to refrain from joining or assisting a union is a fundamental employee right, as critical to the legislative end of labor peace as is the right, preserved in the same section, to participate in union activity. Here we deal with an employee who has chosen

to refrain from union activity, insofar as a governing union-security clause and exclusive representation on the basis of majority choice permit.¹³ Under a union-security provision, an employee's chief means of refraining from supporting a union are to refuse to become a member, or to resign from membership, and to object to paying for activities not germane to collective bargaining. Thus, the standards that the Board and courts apply to allegations that unions have coerced employees by overreaching with respect to union security are vitally important to union members and nonmembers alike.¹⁴

The majority rationale, insofar as it uses the duty of fair representation as the standard for deciding whether a union has violated Section 8(b)(1)(A) with respect to *Beck* rights, cannot fully protect the right to refrain from assisting a union; therefore, I would find additional violations of Section 8(b)(1)(A). As I shall explain, Supreme Court cases dealing with union security pursuant to Section 301 litigation provide no basis for analyzing a union's *Beck* obligations under the rubric of fair representation in an unfair labor practice proceeding under Section 8 of the Act.¹⁵

Instead, the Court's analysis in these cases, and particularly in *Beck* itself, mandates that the Board apply Section 8(b)(1)(A)'s prohibition against restraint and coercion *directly* to union conduct unauthorized by the 8(a)(3) proviso. By holding that the Board has primary

¹³ See text of Sec. 9(a), *supra*, fn. 1.

¹⁴ Experience shows that an employee's attitude toward his union may change. In this case, the Charging Party was a union member for some time, and resigned. See, e.g., *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB 28 (1999) (charging parties had been union members for several years and resigned). The Supreme Court has also recognized this, and found that Sec. 8(a)(3) does as well:

We think it noteworthy that § 8(a)(3) protects the employment rights of the dissatisfied member, as well as those of the worker who never assumed full union membership. By allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union.

Pattern Makers v. NLRB, 473 U.S. 95, 106 (1985).

¹⁵ Supreme Court cases considering state statutes, although based on a slightly different rationale, also fail to support application of the duty of fair representation to fee objectors' rights. In *Abood*, 431 U.S. 209, the Supreme Court reviewed a Michigan statute permitting unions to charge nonmembers agency fees equal to membership dues. The Court held that the statute was constitutional insofar as the service charges financed collective bargaining, contract administration, and grievance adjustment. The case came before the Court on the decision of the Michigan courts that literal application of the statute could violate nonmembers' constitutional rights, and holding that the statute permitted expenditure of agency fees for political purposes. 230 N.W.2d 322, 326-327 (Mich. Ct. App. 1975). In *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), the Court reviewed the adequacy of union procedures under an Illinois statute that authorized exaction of only a fair share of representational expenses from nonmembers. In *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991), a post-*Beck* case, the Court reviewed the chargeability to nonmembers of expenditures under the Michigan statute involved in *Abood*. None of these cases can be read as implying that the duty of fair representation defines the limits on a union's authority respecting the exaction of dues. Rather, each was decided on First Amendment grounds.

¹² The Union promulgated the policy in January 1991 and revised it in November of that year.

jurisdiction over cases involving Section 8,¹⁶ and that a union's collection of funds unauthorized by the 8(a)(3) proviso implicates Section 8 directly,¹⁷ the Court defined the Board's task: apply Section 8(b)(1)(A) to allegations concerning union abuse of the limited authority bestowed by the 8(a)(3) proviso. Thus, I reject the Board's duty of fair representation analysis in *Beck* cases, as I find that it neither provides adequate protection of the Section 7 right to refrain from participating in union activity nor adheres to binding precedent.

B. Facts and Findings

The Charging Party is an employee in a bargaining unit of office clerical employees at Dameron Hospital, an acute care medical facility in Stockton, California.¹⁸ The Union and the Hospital maintain a bargaining relationship covering a unit of about 300 employees, with successive collective-bargaining agreements containing union-security provisions.¹⁹ The Union is a local affiliate of the parent union, the International, and maintains offices in Oakland, California. The Union represents about 205 units in California and Nevada. About 85 percent of these bargaining units contain fewer than 10 employees. The Charging Party's is the Union's second largest unit, with other units ranging from 2 to nearly 2000 employees. Virtually all employees in the Union are private sector clericals, employed by health care, insurance, distribution, and labor organizations.

The International is affiliated in the same manner with a large number of locals throughout the United States and Canada. The record does not show whether most or all of the employees represented by the International's local affiliates work in the private sector as opposed to the public sector, what percentage are clerical employees, or what percentage are employed in Canada. The locals, including the Union here, remit to the International a portion of the dues and other fees they collect from represented employ-

ees; the judge found that the International provides the locals with support and assistance. The record does not specify the nature or extent of such assistance.

As noted, the Union has developed policies regarding dues objectors, with those relevant here dating from January and November 1991. Under the January version, the Union provided notice of its procedures to employees upon their objection to supporting nonrepresentational activities. The Union accommodated dues objections through a "charge and rebate" system, by which the Union collected full dues from objectors, and rebated the nonchargeable portion at the end of the fiscal year.²⁰ The Union also provided objectors with a financial report for the year, with categories of expenditures allocated between representational and nonrepresentational purposes, to allow an objector to challenge any expenditure he believed was incorrectly charged to him. With respect to a challenge of its figures, the Union imposed the following requirements on objectors: to send challenges by certified mail; to specify which expenditures were challenged; and to participate in the Union's internal dispute resolution procedure, called a "Resolution Conference." Under this procedure, an objector wishing to challenge the Union's calculations was required to meet with a union official who would explain to the challenger the "purposes and benefits" of the challenged expenditure. The policy further provided that if the objector did not appear, the Union could take the position that the challenge had been withdrawn, and its executive board would have the discretion to make a unilateral decision. If the challenge was not resolved by the above-described internal dispute resolution procedure, then the employee was entitled to file a notice of arbitration, again by certified mail.

The Union's revised November policy is set out in the record and is provided to unit employees upon resignation. It informs nonmembers that they may object to supporting union activities not germane to employee representation, and that after a nonmember registers an objection, the Union will provide a report of Local Union expenditures, showing chargeable and nonchargeable expenditures. The Union would also arrange an advance reduction in the dues payments, based on the percentage of nonchargeable expenditures in the previous accounting year. Upon receipt of a challenge of any specific expenditure, the Union would deposit the disputed sum in an interest-bearing escrow account. The revised policy also provided for arbitration of challenges to the Union's financial calculations, as follows:

You will be entitled to obtain neutral arbitration of your protest by filing a Notice of Request for Arbitration

¹⁶ *Beck*, 487 U.S. 735, 742.

¹⁷ *Id.*

¹⁸ Stoppenbrink's husband, Ken Stoppenbrink, is the director of personnel at the Hospital, and in that capacity represents the Hospital in labor relations matters, including collective-bargaining negotiations with the Union concerning his wife's unit.

¹⁹ The text of the union-recognition and union-security provisions, in relevant part, follows:

The Hospital recognizes the Union as the exclusive bargaining agent for employees covered by this Agreement whose classifications are listed below . . . and for any other mutually agreed upon classifications which may be established related to the duties of the departments currently covered by this Agreement. . . .

All employees of the Hospital who are subject to this Agreement shall be required as a condition of continued employment to maintain their membership in the Union.

Any person hereafter employed who is not a member of the Union shall make application to join the Union within thirty (30) days from the date of employment, except for a temporary employee specifically hired for a period of less than ninety (90) days.

Any employee who fails to comply with this Article shall be replaced within fifteen (15) days after notice to the Hospital by the Union.

²⁰ The Charging Party received a check in December 1991 for the portion of her dues that the Respondent claimed supported nonrepresentational activities, despite her statement in her letter of resignation and objection that she was entitled to an advance reduction of dues.

with your protest. If you do not file a Notice of Request for Arbitration with your protest, your protest will be submitted to the Local 29 Executive Board for resolution, whose decision will be final.

Thus, the revised policy deleted the certified mail requirement, internal dispute resolution procedure, and "charge and rebate" system.

Stoppenbrink was a member of the Union until May 10, 1991, when she wrote a letter to the Union tendering her resignation, objecting to the Union's use of her dues for nonrepresentational purposes, and seeking an immediate reduction in the amount of her remittance to the Union. On December 12, 1991, the Union provided the Charging Party with a report of expenditures, and, despite her demand for an immediate reduction in her dues in her resignation letter, a refund of the proportion of dues it asserted were spent on nonrepresentational activities. By a January 9, 1992 letter, the Charging Party raised a general challenge to all of the Union's expenditures, but continued to remit the fees required of objectors. The Union has rejected her general challenge and has refused to place her entire service fee in escrow.

The complaint alleged that both versions of the Union's dues objector policy violated Section 8(b)(1)(A).²¹ As to the January version, the complaint alleged, among other things, that the Union violated Section 8(b)(1)(A) by requiring that objectors submit challenges to the Union's financial breakdown by certified mail and participate in the Union's internal dispute resolution procedure. The judge found that the certified mail requirement impeded the exercise of *Beck* rights in violation of Section 8(b)(1)(A), a finding to which no party has excepted. In light of this finding, the judge declined to pass on what he termed a "facial" challenge to the lawfulness of the internal dispute resolution procedure, as he found that the Union had never required an objector to pursue it. The Charging Party has

excepted to the judge's failure to find that the internal dispute resolution procedure was unlawful, arguing that it is a self-created, involuntary set of rules to which a nonmember cannot be bound, and that it is a coercive attempt to "exhaust *Beck* objectors into submission." No party has excepted to the judge's findings, on complaint allegations, that the January policy's "charge and rebate" system and its failure to provide objectors a breakdown of expenses regarding the International and the local in a timely manner also violated Section 8(b)(1)(A).

The complaint alleged that both the January and the November versions violated Section 8(b)(1)(A) by requiring objectors to make specific, rather than general, challenges to chargeable expenditures. The judge found that the specific challenge requirement unreasonably burdened the exercise of *Beck* rights, and therefore violated Section 8(b)(1)(A). The Union excepts, arguing that accepting general challenges would require it to place in indefinite escrow the full dues of any objector who chose to register a general challenge and thus to permit the Charging Party to receive union representation without contributing to its cost.

The complaint alleged additionally that the November policy violated Section 8(b)(1)(A) by including as a chargeable expense category in the Union's financial disclosure a "General and Defense Fund Reserve," as the category fails to provide an objector with sufficient information for a decision whether to challenge its chargeability to objectors. The judge dismissed this allegation, finding that "reserve funds" is an unambiguous accounting term, and that no expenditures had been made from this fund in the relevant accounting year. The Charging Party excepts, arguing that the nomenclature is so vague that an objector cannot make a decision whether to challenge it, and that expenditures of any sort could be made from such an account.

The complaint further alleged that the November policy violated Section 8(b)(1)(A) by failing to allocate the Local and the International's expenditures on a unit-by-unit basis. The judge found that the Union had not violated Section 8(b)(1)(A) by pooling its expenditures, except with respect to litigation expenses; he found that the Union's failure to provide the Charging Party with information regarding litigation expenditures as to her own unit violated Section 8(b)(1)(A). The General Counsel and Charging Party except, arguing that under applicable precedent the Union is obligated to provide the Charging Party with a report of expenditures respecting her unit. The Union excepts to the judge's finding that pooling litigation expenses is unlawful, arguing that a strict rule that litigation expenses outside the unit cannot be charged to objectors would prevent the Union from charging objectors for the use of attorneys in arbitrations and unfair labor practice proceedings.

Finally, the complaint alleged that the Union's November policy violated Section 8(b)(1)(A) by failing to

²¹ The Union has challenged the General Counsel's standing to act on Stoppenbrink's charges, arguing that she is not a bargaining unit employee because she is married to the Hospital's director of personnel. I agree with the judge and my colleagues that at relevant times Stoppenbrink performed bargaining unit work and was viewed by both the Union and the Hospital as a unit employee, as is clearly demonstrated by the Union's receipt and retention of her dues. There is no dispute that Stoppenbrink is a statutory employee; accordingly, no legal obstacle exists to pursuing her charges.

Second, the Union contends that it revised its January policy on November 20, 1991, and had never subjected employees to it, so allegations respecting it are moot. I agree with the judge and my colleagues that these allegations are ripe for decision. As an initial matter, the Charging Party was in fact subject to the January policy, as she objected before the November policy took effect, and did not receive her "rebate" of dues used for nonrepresentational purposes until December 1991. In addition, with respect to other aspects of the January policy alleged as unlawful, Board law permits a charged party to avoid liability for unlawful conduct by repudiating the conduct in a manner that is timely, unambiguous, specific to the coercive conduct, free from other proscribed conduct, adequately published to employees, and accompanied by assurances against further interference. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The Union has failed to meet these conditions here.

escrow the full amount of the Charging Party's service fee; the judge found that the Union's refusal to escrow her full fees upon her general challenge was unlawful. The Union excepts, for essentially the same reasons given as to the general challenge.

My colleagues adopt the judge's findings, except that they reverse and dismiss the allegation that the Union violated Section 8(b)(1)(A) with respect to extra-unit litigation. Regarding the requirement that objectors file specific challenges, the majority finds that, as it would require the Union to provide only major categories of expenditures broken down into chargeable and nonchargeable expenses at this pre-challenge stage, the Union has breached its duty of fair representation by placing too great a burden on challengers to identify specific overstatements or misallocation of funds. Further, the majority rejects the Union's argument that as the Charging Party has rejected arbitration, her general challenge will result in an indefinite escrow of disputed funds. The majority finds that, under the Union's own policy, if a challenger rejects arbitration the Union's executive board has the authority to dispose of the challenge. The majority further finds that the duty of fair representation requires that the Union apply its stated escrow policy to all challenges, regardless of their form, but finds it unnecessary to pass, as a general matter, on whether the duty of fair representation requires a union to escrow disputed funds pending the resolution of challenges. The majority orders the Union, in part, to escrow the disputed funds and amend the dues objection policy so that it complies with *Beck*.

Like the majority, I would find that the Union violated Section 8(b)(1)(A) by requiring specific challenges to chargeable expenditures and by failing to escrow the full amount of the Charging Party's dues and fees. As explained below, however, my rationale for finding these violations differs from that of the majority. I would also find that the Union further violated Section 8(b)(1)(A) as follows.

With respect to the January version, I would reach the issue avoided by the judge and my colleagues and find that the Union's internal dispute resolution procedure restrained and coerced employees in the exercise of *Beck* rights. With respect to the November version, I would find that the "General and Defense Fund Reserve" category violated Section 8(b)(1)(A). In the absence of evidence that chargeable expenditures relating to other units inured to the benefit of the Charging Party's unit, I would find that the Union violated Section 8(b)(1)(A) by failing to provide the Charging Party with a breakdown of expenses pertaining to her unit and by charging objectors for "extra-unit litigation." Finally, because I find that the controlling precedent requires a union to place disputed fees in escrow, I conclude that the Union's failure to do so violated Section 8(b)(1)(A). My reasons for these positions follow, and are based on the analysis of the rights of dues objectors in Supreme Court case law.

II.

A. Congressional and Constitutional Policy with Respect to Union Security: Protecting the Right to Dissent

Thirty-two years before it decided *Beck* in 1988,²² the Supreme Court began to consider whether Congress or a state legislature could authorize unions to negotiate collective-bargaining agreements requiring that employees pay dues and fees as a condition of employment. In both the public and private sectors, the answer was a qualified affirmative. In six cases preceding *Beck*,²³ the Court set out its basis for upholding the legislative decision to permit union-security provisions and explored the statutory and constitutional limits on a union's freedom to expend dues and fees collected from employees who objected to paying those sums. These cases arose under the RLA and in public sector employment under state statutes authorizing an agency shop.²⁴ In each case, the Court found that a statute authorizing unions to seek financial support from all unit employees is based on a permissible legislative judgment, insofar as a union's right to require such support is limited to an employee's fair share of the union's collective-bargaining expenses.

In each case, the collective-bargaining systems exhibit two essential characteristics, which are the preconditions for the legislative judgment that permitting union security would promote important government interests. First, the statute at issue accords the union the status of exclusive representative through the choice of a majority of unit employees. Second, this status as exclusive bargaining representative is accompanied by the duty to represent all employees in a bargaining unit, "union and nonunion."²⁵ In these cases, the Court has examined union security through two lenses: first, the constitutional rights of freedom of expression and association; and second, legislative intent in enacting a constitutional statute permitting unions to impose a financial obligation as a condition of employment on represented employees.

Thus, the coupling of a union's exclusive status and its concomitant duty of fair representation has persuaded Congress and some state legislatures to permit agreements ensuring that all unit employees bear the expenses of representation. In its analysis of the legislative history of union security under the RLA in *Machinists v. Street*, the Court acknowledged that representing all employees en-

²² *Railway Employees v. Hanson*, 351 U.S. 225 (1956).

²³ *Id.*; *Machinists v. Street*, 367 U.S. 740; *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Board of Education*, 431 U.S. 209; *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292.

²⁴ See fn. 5, *supra*, for text of sec. 2, Eleventh.

²⁵ *Street*, *supra*, 367 U.S. 740, 761 (citations omitted). The rail unions' argument that their duty to represent all employees enabled non-members to secure the benefits of representation without financially supporting its costs prevailed, and in passing sec. 2, Eleventh, Congress' interest in allowing unions to spread the costs of collective bargaining to all represented employees "overbore the arguments in favor of . . . complete individual freedom of choice." *Id.* at 762-763.

tails “the expenditure of considerable funds,”²⁶ and noted that the rail unions based their arguments supporting statutory authorization of union security on these expenses. The unions “advanced as their purpose the elimination of the ‘free riders’—those employees who obtained the benefits of the unions’ participation in the machinery of the Act without financially supporting the unions.”²⁷

According to the Court, Congress agreed that, where unions were obligated to represent all employees, allowing unions to negotiate agreements requiring nonmembers to pay their share of representational expenses would advance labor peace.²⁸ Thus, section 2, Eleventh, which enables rail unions to bargain for union security, “contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.”²⁹

The Court observed that the same governmental interest in furthering labor peace by eliminating “free riders” had led to the authorization of union security in the public sector. As the Court stated in *Abood v. Detroit Board of Education*:

The governmental interests advanced by the agency shop provision in the Michigan statute are much the same as those promoted . . . in federal labor law. The confusion and conflict that could arise . . . are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. . . . The desirability of labor peace is no less important in the public sector, nor is the risk of “free riders” any smaller.³⁰

In these cases, the Court did not use the duty of fair representation to measure a union’s satisfaction of its obligation to accommodate the rights of objectors. Instead, the Court found that Congress and state legislatures, acting constitutionally, had struck a balance between the competing interests of labor organizations and those of objecting nonmembers, for whom a union-imposed financial obligation is an infringement on their right to determine their own associations.³¹

The Court has consistently grounded its analysis in dues objector cases on several essential perceptions that tran-

scend the legal scheme governing the employer.³² The first, and the most grave, is a candid awareness of the limitation on employee freedoms imposed by exclusive representation and by a financial obligation arising from a union-security arrangement, and the consequent need to minimize these infringements of individual employee rights. The Court has noted a “congressional concern over possible impingements on the interests of individual dissenters from union policies. . . . [T]he policy of full freedom of choice . . . survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent.”³³

Second, the Court has also observed that employees, whether working in the public or private sector, have a common set of interests. In *Abood*, the Court remarked that:

“The uniqueness of public employment is *not in the employees* nor in the work performed; the uniqueness is in the special character of the employer.” . . . The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees.³⁴

Finally, in dealing with union security in the public and private sectors, the Court has set its analysis of section 2, Eleventh in *Street* as its standard. The Court has thus used section 2, Eleventh to judge the constitutionality of state union security statutes³⁵ as well as the lawfulness of union conduct under the RLA, and, since *Beck*, under Section 8(a)(3). Thus, the Court has perceived that the problems and the policies involved in an exclusive representation/union security labor relations structure are best served by a unified treatment of the rights and remedies of employees under such a system.

A brief discussion of these seminal cases follows.

In *Railway Employees v. Hanson*,³⁶ the Court ruled on the constitutionality of section 2, Eleventh’s authorization of union-security agreements. The case arose from a suit

³² An exception may be the requirement that a union provide a swift and impartial means of deciding a dispute over the fee charged objectors. See fns. 84–85, 134–137, *infra*, and accompanying text.

³³ *Street*, 367 U.S. 740, 766–767 (footnote omitted). See also *Abood*, *supra*, 431 U.S. at 234 (that nonmembers “are compelled to make, rather than prohibited from making, works no less an infringement of their constitutional rights”).

³⁴ 431 U.S. at 230 (quoting Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 670 (1975) (emphasis added by court)). See also *id.* at 234–235 (Supreme Court commented, regarding the rights at issue in a case arising in the public sector, that the fact that objectors are “compelled to make, rather than prohibited from making, contributions for political purposes works . . . an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience.” (Footnote omitted.) See text accompanying fns. 65–67, *infra*).

³⁵ See, e.g., *Abood*, 431 U.S. at 232, and text accompanying fns. 63–64, *infra*.

³⁶ 351 U.S. 225.

²⁶ *Id.* at 760.

²⁷ *Id.* at 761.

²⁸ *Id.* at 762–764.

²⁹ *Id.* at 764 (footnote omitted).

³⁰ *Abood*, *supra*, 431 U.S. at 224 (citation omitted).

³¹ See *id.* at 217–223, and especially this key passage:

To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Id. at 222 (footnote omitted).

by nonmembers in state court to enjoin application of a union-shop agreement. The state supreme court upheld the trial court's injunction, finding that objectors were deprived of their constitutional freedom of association. The Supreme Court reversed and held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments."³⁷ The Court noted that Congress is charged with identifying "[t]he ingredients of industrial peace and stabilized labor-management relations"³⁸ and had determined that a policy that employees who benefit from union representation share its cost would promote labor peace.³⁹

In *Hanson*, the employees sued before the union-security provision had taken effect, so the Court did not examine particular expenditures or issues of proof. The Court's limited focus, however, did not prevent *Hanson* from setting the course for the development of union security law. As the Court noted:

The only conditions to union membership authorized by § 2, Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. . . . If "assessments" are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.⁴⁰

In *Machinists v. Street*,⁴¹ the Court took on that "different problem," and considered the "question whether the power [of unions to spend exacted money] is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes,"⁴² and found that the statute itself imposes such a restriction.

In *Street*, objectors alleged that money extracted under a section 2, Eleventh union-security provision was used to support political causes with which they disagreed. The record in *Street* contained explicit findings of political uses to which the union had put the employees' dues.⁴³ Although the state court had found that section 2, Eleventh violated the Constitution insofar as it permitted unions to use funds extracted from objecting nonmembers for political purposes, the Court avoided reaching constitutional considerations in deciding whether limits existed to a union's power to expend exacted funds. A constitutional analysis would be unnecessary "unless we

must conclude that Congress, in authorizing a union shop under § 2, Eleventh, also meant that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes."⁴⁴ The Court's focus thus shifted to Congressional intent in the statute itself:

We have therefore examined the legislative history of § 2, Eleventh . . . to determine whether a construction is "fairly possible" which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. We conclude that such a construction is not only "fairly possible" but entirely reasonable. . . .⁴⁵

The Court found that each objector had made his objection to the use of his money for political purposes known to the union.⁴⁶ Thus, the Court decided, the unions were

without power to use payments thereafter tendered by them for such political causes. However, the union-shop agreement itself is not unlawful. . . . The [objectors] therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations . . . but from § 2, Eleventh itself. In other words, [the objectors'] grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds.⁴⁷

In *Street*, the Court applied to union security a standard for balancing governmental and individual interests that was borrowed from constitutional analysis, but that has great importance for the consideration of union security in both the public and private sectors. This theory may be called the "limited inroads" theory: where governmental or policy interests necessitate some abridgement of an individual's exercise of personal or political freedoms, the infringement on individual interests should be tailored as narrowly as possible to accomplish the purpose without any unnecessary diminishment of the freedom at issue. Thus, the Court noted in *Street* that Congress had demonstrated a "concern over possible

⁴⁴ Id. at 749.

⁴⁵ Id. at 750.

⁴⁶ Id. *Street* set this burden on objectors, followed in subsequent cases: a nonunion employee's notification to the union that he objects to the expenditure of his funds on nonrepresentational activities is the sole, but necessary, prerequisite for relief:

Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of § 2, Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed--it must affirmatively be made known to the union by the dissenting employee.

Id. at 774.

⁴⁷ Id. at 771 (citation omitted).

³⁷ Id. at 238.

³⁸ Id. at 234.

³⁹ Id. at 233.

⁴⁰ Id. at 235 (footnote omitted).

⁴¹ 367 U.S. 740.

⁴² Id. at 768.

⁴³ Id. at 744.

impingements on the interests of individual dissenters from union policies,”⁴⁸ and found that “Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, [49] but rather made inroads on it for the limited purpose of eliminating the problems created by the ‘free rider.’ That policy [of freedom of choice] survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent.”⁵⁰ The Court observed further:

We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. . . . Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. . . . [I]t is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified. On the other hand, it is equally clear that it is a use to support activities within the area of dissenters’ interests which Congress enacted the proviso to protect. We give § 2, Eleventh the construction which achieves both congressional purposes when we hold . . . that § 2, Eleventh is to be construed to deny the unions, over an employee’s objection, the power to use his exacted funds to support political causes which he opposes.⁵¹

It is important to note that the objecting nonmembers’ cause of action in *Street* arose from the statute itself, i.e., the union’s expenditure of objectors’ funds on nonrepresentational purposes is a violation of the statute. “Their [the objectors’] right of action stems not from constitutional limitations on Congress’ power to authorize the union shop, but from § 2, Eleventh itself.”⁵² Even though *Street* explicitly references the duty of fair representation as a reason why Congress chose to permit unions to negotiate agreements requiring that all employees help defray the costs of membership,⁵³ the Court did not rely on the union duty of fair representation to unit employees to define the limits on union authority.⁵⁴

Thus, the Court found that Congress intended section 2, Eleventh to permit unions to require employees to

support representational activities only.⁵⁵ The principle of voluntary unionism was infringed, but only to the limited extent Congress deemed necessary to avoid problems that might arise from permitting “free ridership.”⁵⁶

In *Railway Clerks v. Allen*,⁵⁷ the Court emphasized that its interpretation of congressional intent in *Street* did not outlaw union-security provisions themselves, but limited the uses to which enforced exactions could be put. *Allen* involved review of a state court injunction, modifiable in light of a showing of the proportion of the union’s expenditures for bargaining to the dues collected, against collection of funds from objectors. The Court found the injunction inconsistent with *Street*, as that case had held that section 2, Eleventh obligated objectors to pay their share of representational expenses.⁵⁸ The Court remanded the case for relief consistent with *Street*,⁵⁹ seeking two determinations: “(1) what expenditures disclosed by the record are political; (2) what percentage of total union expenditures are political expenditures.”⁶⁰

The Court held further that the employees’ general allegation that the union was using sums collected under section 2, Eleventh for political activities with which they disagreed stated a cause of action, and noted that “[s]ince the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.”⁶¹ In so stating, the Court placed the burden on the union to justify the charges to employees.

In *Abood v. Detroit Board of Education*,⁶² the Court turned from union security under section 2, Eleventh to limits on union power to exact funds from employees working for state government. In *Abood*, teachers challenged the constitutionality of an “agency shop” authorized by a Michigan statute, seeking its invalidation as an infringement of their First and Fourteenth Amendment rights. After the trial court dismissed the challenge, the state court of appeals, relying on *Hanson* and *Street*, held that, as Michigan’s statute did not limit unions’ use of

⁵⁵ Id. at 764.

⁵⁶ Id. at 763–764.

⁵⁷ 373 U.S. 113.

⁵⁸ Id. at 119–120.

⁵⁹ Id. at 120–121; i.e., the reduction of the objectors’ agency fee by the amount spent on activities not germane to collective bargaining or an injunction barring the union from expending that portion of the employees’ fees. See *Street*, 367 U.S. at 774–775.

⁶⁰ 373 U.S. 113, 121.

⁶¹ Id. at 122. The Court noted further that:

[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions’ right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters’ such exactions in support of political activities.

Id.

⁶² 431 U.S. 209.

⁴⁸ Id. at 766.

⁴⁹ The “1934 Act” refers to an earlier amendment of the RLA. Before the passage of sec. 2, Eleventh in 1951, the RLA provided for fully voluntary unionism, with no mechanism for support of a bargaining representative by nonmembers and no authorization of a union to require employees to become members.

⁵⁰ Id. at 767.

⁵¹ Id. at 768–769.

⁵² Id. at 771.

⁵³ Id. at 762.

⁵⁴ Id. at 761–764.

nonmembers' fees to the costs of collective bargaining, to the extent the union used service charges for activities other than collective bargaining, contract administration, and grievance adjustment, the agency-shop provision "could" violate employees' constitutional rights. The Supreme Court of Michigan denied review.

The Court found that the state court had correctly relied on RLA precedent: ascertaining whether an agency-shop provision covering governmental employees is constitutional begins with *Hanson* and *Street*, "two cases in this Court that on their face go far toward resolving the issue."⁶³ The Court noted that Michigan modeled its collective bargaining structure after the RLA and NLRA, and emphasized that the basis for permitting union security is the same as under the RLA and the NLRA.⁶⁴ The Court also agreed that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," so that requiring an employee to support a bargaining agent financially might interfere with the freedom to associate or refrain from association.⁶⁵ The Court found, however, that

[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.⁶⁶

One of *Abood*'s most significant holdings is its response to the constitutional concern of the Michigan court: while recognizing the existence of constitutional protections for public employees, the Supreme Court nevertheless found that a public employee does not have a "weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation."⁶⁷ The Court also reiterated the essential burdens for objector and union: the employee must make his objection known,⁶⁸ but "basic considerations of fairness" require that the union bear the burden of proof, as it possesses the factual record on which the calculations of expenditures are based.⁶⁹

In *Ellis v. Railway Clerks*,⁷⁰ an RLA case, and *Chicago Teachers Local 1 v. Hudson*,⁷¹ a public sector case,

the Court moved to the substance of objectors' claims: what expenses are chargeable to objectors as germane to collective bargaining, and what procedures, if any, are necessary to protect the dissenters' rights.

In *Ellis*, the Court considered the chargeability of five union activities: the national union's convention; social activities; publications; general organizing expenses; and extra-unit litigation not involving contract negotiation or grievance settlement. The Court concluded that unions could require objectors to contribute to the cost of conventions, because "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy."⁷² With respect to social functions, the Court found that the very small expense incurred for "refreshments for union business meetings and occasional social activities" were also chargeable, as they brought about harmony and close ties among members.⁷³ As to the union's publication, the Court found its costs representational, as it constituted a means of communicating with employees, but approved the apportionment of the cost of the publication and held chargeable to objectors only those articles that dealt with statutory activities.⁷⁴ Expenses for organizing other employers were not chargeable, as Congress had not considered organizational efforts in authorizing the agency shop, and by definition, such expenses go to employees outside the unit, and provide "only the most attenuated benefits" to the objectors' unit.⁷⁵ Further, the Court strictly limited the types of litigation chargeable to objectors:

The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable . . . as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.⁷⁶

In *Ellis*, the Court also rejected the use of a "charge and rebate" system for objectors, such as the Union in this case used in its January policy. A "rebate" system, by which, as discussed above, a union charges objectors

⁶³ Id. at 217.

⁶⁴ Id. at 223–224.

⁶⁵ Id. at 222.

⁶⁶ Id. at 225–226.

⁶⁷ Id. at 229.

⁶⁸ Id. at 238 (discussing *Street*, 367 U.S. 740). See fn. 46–47, *supra*, and accompanying text.

⁶⁹ Id. at 239, fn. 40 (quoting *Allen*, 373 U.S. 113, 122).

⁷⁰ 466 U.S. 435.

⁷¹ 475 U.S. 292.

⁷² 466 U.S. 435, 448.

⁷³ Id. at 449–450. Such events under the union's constitution were open to nonmembers. Id. at 449. Thus, the Court's rationale here is not necessarily binding in a case in which a union spends significant amounts on activities that exclude nonmembers.

⁷⁴ Id. at 450–451.

⁷⁵ Id. at 451–453.

⁷⁶ Id. at 453 (emphasis added).

full dues and then returns to them the portion of their dues expended on nonrepresentational activities, was found inadequate to protect the right of objectors to refrain from activities to which they object because

[b]y exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization.

....

Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.⁷⁷

In *Hudson*,⁷⁸ nonmembers challenged the union's procedure for determining the amount nonmembers paid to support collective-bargaining activities. The Supreme Court held that the procedure was inadequate, and set out a base line for safeguarding objectors' rights:

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.⁷⁹

Under the agency shop in *Hudson*, the employer deducted "proportionate share," or "fair share," payments from nonmembers' pay. The union specified the amount, based on the previous year's financial records. The union also established a procedure for challenges to the "fair share" payment. After a nonmember challenged the "fair share" payment in writing to the union president, a three-stage procedure went into motion: the union's executive committee considered the challenge, then the union's board, and finally, if the challenge was unresolved, the union president chose an arbitrator from a state list to decide the issue. If a challenge was sustained at any point, the challenger was repaid for prior overcharges, and all nonmembers received an immediate reduction.

The Court explained the necessity for attention to a union's procedure for objections and challenges:

First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the in-

dividual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.⁸⁰

The Court found that the procedure in *Hudson* contained three flaws. First, a rebate was impermissible because it carried the risk that objectors' funds could be temporarily put to an impermissible use.⁸¹ Second, the union failed to provide nonmembers with sufficient information about the basis for the proportionate share:

Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.⁸²

The information the union provided was inadequate in part because

[i]nstead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.⁸³

Finally, the procedure also failed to provide "a reasonably prompt decision by an impartial decisionmaker. . . . The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner."⁸⁴ The Court found that the procedure in *Hudson* could not satisfy these criteria because it was entirely under union control. Even the choice of arbitrator was at the union's sole discretion.⁸⁵

⁸⁰ Id. at 302–303 (footnote omitted).

⁸¹ Id. at 305–306.

⁸² Id. at 306 (emphasis added).

⁸³ Id. at 306–307. The Court recognized that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." Id. at 307 fn. 18 (quoting *Allen*, 373 U.S. 113, 122) (alteration in original). Thus, for instance, the Union may calculate its fee on the basis of its expenses during the past year and need not provide nonmembers with an exhaustive and detailed list of expenditures, but adequate disclosure should include major categories of expenses, and verification by an independent auditor. Id.

⁸⁴ Id. at 307 (footnote omitted).

⁸⁵ Id. at 308. The Court noted that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial

⁷⁷ Id. at 444.

⁷⁸ 475 U.S. 292.

⁷⁹ Id. at 310.

The Court also rejected the union's proposal that an escrow of the entire amount of an objector's dues would satisfy the procedural requirements, as it did not cure the second and third infirmities. While a union is obligated to escrow funds in dispute, a complete escrow would not be required, "[i]f, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, [because] there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories."⁸⁶

B. Communications Workers v. Beck: Congressional Intent Respecting the 8(a)(3) Proviso

In *Beck*,⁸⁷ the Court set the precise limits of union authority to expend funds collected from objecting nonmembers under union-security provisions authorized by the 8(a)(3) proviso.⁸⁸ *Beck* is a judicial landmark that altered received wisdom regarding Section 8(a)(3) and applied the Court's interpretation of the scope of and limits on permissive union security under the RLA and the Constitution to the Act. *Beck* is not a simple case; thus, the Court's reasoning with respect to both the jurisdictional issues and the merits requires careful examination.

The matter originated in a suit in federal court by nonmember employees who objected to the expenditure of their dues on activities other than collective bargaining. The employees alleged, among other claims, that such expenditures breached the union's duty of fair representation⁸⁹ and violated their rights under the First Amendment and Section 8(a)(3). The union argued that the claims should be dismissed, as the 8(a)(3) proviso permitted such expenditures, the Board had primary jurisdiction over Section 8(a)(3), and no constitutional rights are implicated by a 8(a)(3) union-security provision. The Supreme Court held that the lower courts properly exercised jurisdiction over the employees' duty of fair representation and First Amendment claims, but that *primary jurisdiction* over the claim that the 8(a)(3) proviso was violated rested with the Board.⁹⁰ The Court

found, however, that the Federal court could decide the 8(a)(3) question because the union in defense had raised the scope of the 8(a)(3) proviso.⁹¹ Thus, *Beck* brought the employees' 8(a)(3) claim to the fore, and like *Street*, is an exercise in statutory construction.

The Court posed a two-part statement of the issues: (1) whether Section 8(a)(3) "permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment"; and (2) "and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights."⁹² Under the Court's analysis, then, the necessary predicate to consideration of the duty of fair representation and constitutional claims was whether the statute in fact permitted the expenditures at issue. The Court answered the first question—"whether [the 'membership' requirement permitted by the 8(a)(3) proviso] includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment"⁹³—in the negative. Answering its first question, the Court held that the 8(a)(3) proviso does not permit such expenditures; it permits unions to exact "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"⁹⁴ As a matter of logic and judicial restraint, having so held, the Court had no need to reach the second question—whether such expenditures, *if permitted by the statute*, would breach the duty of fair representation. As in *Street*, because the challenged expenditures exceeded the limited authority granted by Congress in the exceptions to Section 7 and Section 8(a)(3), under *Beck*, unions have no authority to continue collecting money from objectors for such expenditures.⁹⁵

In deciding that the membership obligation under a lawful union-security provision does not include the obligation to support activities not "germane to collective bargaining, contract administration, and grievance adjustment,"⁹⁶ the Court, as it had done in analyzing agency

decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice. . . . The arbitrator's decision would not receive preclusive effect in any subsequent [court] action." Id. at 308, fn. 21 (citations omitted). See discussion at fns. 133–137, *infra*, and accompanying text.

⁸⁶ Id. at 310. The Court added that "[i]f the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified." Id. at 310 fn. 23.

⁸⁷ 487 U.S. 735.

⁸⁸ Id. at 738.

⁸⁹ The duty of fair representation claim arose under Sec. 301. See fn. 1, *supra*, for text of Sec. 301. Among other things, Sec. 301 provides represented employees with a right of direct access to Federal courts for suits against their union. The Federal courts also exercise direct jurisdiction over constitutional claims under art. III, sec. 2 of the U.S. Constitution. See discussion in fn. 11, *infra*.

⁹⁰ 487 U.S. 735, 742.

⁹¹ Id. at 743–744.

⁹² Id. at 738 (emphasis added).

⁹³ Id. at 745.

⁹⁴ Id. at 762–763 (quoting *Ellis*, 466 U.S. 435, 448).

⁹⁵ In this respect as well, Sec. 8(a)(3) mirrors sec. 2, Eleventh. As the Court stated in *Street*:

We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. . . . [The use of extracted funds for political purposes] is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons . . . accepted by Congress why authority to make union-shop agreements was justified.

367 U.S. 740, 768.

⁹⁶ 487 U.S. 735, 745.

shop authorizations by state statutes, looked to *Street* for guidance. In *Street*, according to *Beck*, the Court had held that

[Section] 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes. . . . Our decision in *Street* . . . is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical. Indeed, we have previously described the two provisions as “statutory equivalent[s].” . . . [I]n both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Thus, in amending the RLA in 1951, Congress . . . repeatedly emphasized that it was extending “to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act.”⁹⁷

Beck is a landmark both with respect to the Court’s analysis of congressional intent in the National Labor Relations Act and of the limits on union power in a statutory scheme that embraces voluntary unionism. But as *Beck* did not come before the Court on a question directly arising under Section 8 of the Act, the Court did not and could not hold that compelled exactions are unfair labor practices—only that the 8(a)(3) proviso does not authorize them. Moreover, because the issue in *Beck* was the extent of union authority under the Act, new employee rights are not explicitly enunciated, although some are implicitly recognized—viz., the right to object, as the employees’ objection to paying for activities unrelated to collective bargaining precipitated the finding that Section 8(a)(3) does not permit such exactions.⁹⁸ Further, as will be discussed below, other employee rights can be derived.

Thus, *Beck*’s delineation of “the precise limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements”⁹⁹ created a challenge for the Board, as areas of union conduct hitherto treated as lawful could no longer be permitted. But *Beck* clearly marks the direction Board law should take:

A simple recitation of respondents’ § 8(a)(3) claim reveals that it falls squarely within the primary jurisdic-

tion of the Board: respondents contend that, by collecting and using agency fees for nonrepresentational purposes, the union has contravened the express terms of § 8(a)(3), which, respondents argue, provides a limited authorization for the collection of only those fees necessary to finance collective-bargaining activities. There can be no doubt, therefore, that the challenged fee-collecting activity is “subject to” § 8.¹⁰⁰

This holding is critical to developing Board law governing union security. If expenditure of the forced exactions is not authorized by the 8(a)(3) proviso, and the union’s “fee-collecting activity” falls under Section 8, then it is covered by 8(b)’s prohibitions on union conduct. As this “fee collecting” forces employees, as a condition of employment, to pay to the union money that it is not authorized by the statute to collect, it directly coerces employees in the exercise of Section 7 rights. Thus, under the jurisdictional and analytical framework set out in *Beck*, this “fee-collecting activity,” insofar as it involves funds to be spent on nonrepresentational activities, is a per se violation of Section 8(b)(1)(A).¹⁰¹

C. The 8(a)(3) Proviso and the Section 7 Right to Refrain

As set out in footnote 1, Section 7 provides in pertinent part that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

As seen above, *Beck* construed the Section 8(a)(3) proviso as authorizing a narrower range of union conduct than had previously been understood.¹⁰² Thus, as the right to refrain from union activity in Section 7 is “affected” by the authorization of union security in the 8(a)(3) proviso, that right was correspondingly broadened. Specifically, *Beck* recognized that employees working under the Act have the same right as their fellows under the RLA or in the public sector to object to and be relieved of the burden of supporting a union’s nonrepresentational activities. After *Beck*, while employees working under union-security provisions cannot completely refrain from union activity, their ability to refrain from *assisting* a labor organization has been expanded.

⁹⁷ Id. at 745–746 (quoting *Ellis*, 466 U.S. 435, 452 fn. 13; 96 Cong. Rec. 17055 (1951) (remarks of Rep. Brown)) (other citations and footnotes omitted).

⁹⁸ See the terms in which the Court framed the question before it in *Beck*: “Today we must decide whether this provision also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment.” 487 U.S. 735, 738 (emphasis added).

As noted above, the Court found in *Street* that the fact that employees had made their objection to paying for nonrepresentational activities rendered the union without power to exact such moneys. See 367 U.S. 740, 771, and fns. 46–47, *supra*, and accompanying text.

⁹⁹ 487 U.S. 735, 745.

¹⁰⁰ Id. at 742.

¹⁰¹ This is true a fortiori, as the statute does not accord a union the independent right to require financial support from objectors. Instead, Congress’s allowance of permissive union security is a narrow exception to the broad employee rights to, *inter alia*, refrain from union activity in Sec. 7 and to be free of discrimination under Sec. 8(a)(3). See text of these provisions in fn. 1, *supra*.

¹⁰² See text accompanying fns. 3–4, *supra*.

In *Pattern Makers v. NLRB*,¹⁰³ the Supreme Court upheld the Board's interpretation of Section 8(b)(1)(A) as not permitting unions to place limitations, temporal or otherwise, on the right to resign from union membership. Such restraints, the Court found, restrained and coerced employees in their exercise of the right to refrain in violation of Section 8(b)(1)(A), even where they did not threaten loss of employment.¹⁰⁴ A union's abuse of the authority to negotiate union-security agreements under the Section 8(a)(3) proviso constitutes restraint and coercion no less than the limitation on the right to resign. In fact, a union's collection from objecting nonmembers funds expended for purposes not authorized by the Section 8(a)(3) proviso is a more direct form of coercion. Such conduct directly affects an employee's employment, as an employee who refuses to pay for an activity that a union unlawfully insists is chargeable to objectors is in danger of losing his job for failure to meet his union security obligations. Thus, a union's conduct with respect to the collection of dues and fees from objectors directly implicates Section 8(b)(1)(A), for the additional reason that the right to refrain from assisting a union is infringed by a union's unlawful activity.¹⁰⁵

*D. The Board Interprets Congressional Intent:
California Saw & Knife Works*

In *California Saw & Knife Works*, its first case setting out the principles for consideration of *Beck* violations, the Board interpreted *Beck* as holding that "the expenditure of dues and fees on activities outside the union's role as collective-bargaining representative violate[s] the union's duty of fair representation to nonmember employees who object[] to such expenditures."¹⁰⁶ The Board held that the standard for determining union liability in such cases was the duty of fair representation, and cited *Air Line Pilots v. O'Neill*¹⁰⁷ for the "explicit directive

that the duty of fair representation applies to all union activity."¹⁰⁸ The Board stated that:

[W]e find inescapable the conclusion that a union's obligations under *Beck* are to be measured by that standard. Thus, we announce today that we shall apply to cases involving *Beck*-type issues [this standard]—that is, that a union breaches its duty of fair representation if its actions are arbitrary, discriminatory, or in bad faith.¹⁰⁹

In establishing this standard, the Board erred by confusing the condition precedent for union security—the union's duty to represent all unit employees fairly—with the standard to be applied to union conduct alleged to violate Section 8(b)(1)(A). *Beck*'s holding—that the Board has primary jurisdiction over statutory claims involving objectors' rights and that the 8(a)(3) proviso permits only the expenditure of objectors' funds on collective bargaining activities—does not support application of the duty of fair representation to dues objector cases in a statutory framework that directly prohibits union coercion and restraint of employees. As noted, a union's obligation to represent all employees fairly is a *necessary condition* for the policy of permitting unions to negotiate agreements requiring all unit employees to pay their fair share of the costs of representation, not a standard against which to measure unions' compliance with requirements protecting nonmembers' rights.¹¹⁰ Rather, the Court's jurisprudence with respect to section 2, Eleventh of the RLA plainly demonstrates that a statutory analysis is appropriate. As noted,¹¹¹ the Court held that under the RLA, an objector's right of action arises from the statute itself. As the Court held in *Beck* that section 2, Eleventh and Section 8(a)(3) are "statutory

tant to note that *Marquez*, like *Beck*, is a Sec. 301 case, and that the Court therefore discussed the right of action in federal court under Sec. 301 for a union's breach of its duty of fair representation.

In *Marquez*, the Court explained:

In *Beck*, the union collected fees and dues from bargaining unit employees under its statutory grant of authority to serve as the exclusive bargaining representative. But then it used that money for purposes wholly unrelated to the grant of authority that gave it the right to collect that money, and in ways that were antithetical to the interests of some of the workers that it was required to serve.

Id.

¹⁰⁸ 320 NLRB 224, 230.

¹⁰⁹ Id. (footnote omitted).

¹¹⁰ See discussion of pre-*Beck* cases in sec. II, A, and *Street*, 367 U.S. 740, 760–761.

The *California Saw & Knife* Board went further astray, moreover, in citing a comment that "judicial and agency decisions have been increasingly sensitive to the careful balance struck by the Supreme Court in *Hudson* [475 U.S. 292, 303] between the constitutional and statutorily protected activities of nonunion employees and the interests of unions in being able to perform their statutory duties without unreasonable administrative burdens." 320 NLRB 224, 230 (quoting Matsis, *Procedural Rights of Fair Share Objectors After Hudson and Beck*, 6 Labor Lawyer 251, 293 (1990)). Those interests are not those to which the duty of fair representation refers. The duty deals with a union's need to balance the competing interests of different groups of employees within the unit—not the differing interests of unit employees and the union as an institution.

¹¹¹ See text accompanying fns. 52–54, supra.

¹⁰³ 473 U.S. 95.

¹⁰⁴ Id. at 106–107.

¹⁰⁵ Thus, the procedures that a union establishes for handling objections must be carefully tailored to avoid coercion. In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Supreme Court held that "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." A procedure that impeded an objector's rights under *Beck* would clearly impair a policy Congress had imbedded in the labor laws, as it would coerce employees in the exercise of Sec. 7 rights, and would be applied to nonmembers, who could not escape the rule through resignation. See *Polymark Corp.*, 329 NLRB 9, 14 (1999), (Brame, concurring in part and dissenting in part) (*Scofield* prohibits the imposition of a "window period" for submission of objections).

¹⁰⁶ 320 NLRB 224, 224 (citing *Beck*, 487 U.S. 735, 752–754). The citation leads to the Court's discussion of the parity of Sec. 8(a)(3) and sec. 2, Eleventh of the RLA.

¹⁰⁷ 499 U.S. 65 (1991).

Marquez v. Screen Actors, 525 U.S. 33 (1998), indicates that a union both violates the statute and breaches its duty of fair representation if it charges nonmember objectors for nonrepresentational activities. Id. at 45. With respect to the duty of fair representation analysis, it is impor-

equivalents,” it follows that in *Beck* the Court recognized a statutory right.

For the Board, which has primary jurisdiction over Section 8(b)(1)(A), then, a duty of fair representation analysis contradicts *Beck*. The duty of fair representation sets a minimum standard for a union’s performance of its statutory functions—those Congress deemed essential to labor peace. When a union requires objectors, who are dependent on satisfaction of their union security obligations for continued employment, to make contributions that serve only its institutional interests as a voluntary organization, it engages in conduct not permitted by the very provision that authorizes it to require that employees support it financially as a condition of employment. Thus, in engaging in this conduct, a union is clearly not performing a statutory function. Rather, it is requiring employees to pay it money above what the statute authorizes, or risk losing their jobs. Such conduct could not more clearly coerce employees.

In addition, the standard for analysis in duty of fair representation cases simply does not apply when dealing with *Beck* allegations. As the court stated in *Shea v. Machinists*.¹¹²

The DFR standard is applicable to evaluate a union’s treatment of its members and represented nonmembers in the context of a collective bargaining agreement, that is, when a union is performing traditional representational union functions on behalf of those that it represents. Issues such as the administration of the collective bargaining agreement, the fairness of the [union’s] representation of the employees in negotiations with the employer, or how a union treats those that it represents, are susceptible to DFR review. A highly deferential standard of review is appropriate in those cases because the court is being called upon to review the union’s performance of union functions and should not substitute its own judgment of how a union should conduct its affairs. . . . But, this is a dispute between the union and the objecting employees that does not require us to second-guess the union’s judgment as exclusive bargaining representative. Rather we are called upon to protect the free speech rights of objecting employees from intrusive union procedures.¹¹³

The Board also held in *California Saw & Knife* that 8(a)(3) union-security provisions “do not bear the imprimatur of the state, and . . . public sector and RLA precedents premised on constitutional principles are not controlling in the context of the NLRA.”¹¹⁴ I note that

the Supreme Court found it unnecessary to reach the issue of state action under the NLRA in *Beck*,¹¹⁵ and, although I view the question as open, I accordingly find it unnecessary to reach as well. I disagree, however, both as a matter of law and policy, that public sector labor law and RLA precedent are not binding in cases alleging violations of the Act, and I believe that the brief survey of Supreme Court cases, above, supports this view. A unified set of principles in line with a unified national labor policy is appropriate, insofar as different factual settings permit. The cases discussed above demonstrate that the Court’s position has always been that any theoretical differences between public and private employment do not translate into legal distinctions. Further, with respect to the RLA, the *Beck* Court settled how far the equivalence of section 2, Eleventh and Section 8(a)(3) should be taken: its view that “[e]ven assuming . . . that the NLRA and the RLA . . . differ [with respect to state action], we do not believe that the absence of any constitutional concerns in this case would warrant reading [the two statutes] differently”¹¹⁶ is an irrefutable basis for accepting RLA precedent as binding. Moreover, the Court’s reliance in cases involving constitutional rights, e.g., *Abood*, on cases, particularly *Street*, that construe section 2, Eleventh as a statute, preclude the notion that the Court would view Section 8(a)(3) and the NLRA as requiring an entirely separate analysis. The Court’s view of employment as essentially unified simply will not admit of such an abandonment of logic.

Further, as a matter of policy, the centrality of the right to refrain to the statutory scheme enforced by the Board, as enacted by Congress and developed through Supreme Court jurisprudence, renders case law developed under public sector law applicable. Congress has charged the Board with protecting and enforcing the rights accorded employees under the Act, inter alia, to engage in or refrain from union activities. These rights are the equivalent in the statutory scheme of the NLRA to the constitutional rights of free speech, freedom of association, and liberty that courts have protected in cases involving public employment or employment under the RLA through the application of statutory or constitutional principles. The Board’s role with respect to employees’ Section 7 rights—including every aspect of the right to refrain—is as fundamental to its mission as is the federal courts’ role in protecting and enforcing the panoply of federal statutory and constitutional rights. Thus, no basis exists for distinguishing among the lines of precedent dealing with

RLA cases had a constitutional basis. Id. at 226 fn. 19. The majority’s position is not entirely clear. It gains “much useful guidance” from public sector and RLA cases, “particularly when the Court appears to be resting its analysis on the duty of fair representation.” Id. at 227–228 fn. 25. The Board later stated that precedent under the RLA decided on statutory “fair representation principles” was “relevant.” Id. at 230 fn. 35. Clearly, a more systematic approach is necessary.

¹¹⁵ 487 U.S. 735, 761.

¹¹⁶ Id. at 761–762 (emphasis added).

¹¹² 154 F.3d 508 (5th Cir. 1998).

¹¹³ Id. at 517 (citation omitted).

¹¹⁴ Id. at 226. Former Member Cohen concluded that RLA precedent is “apposite” to cases under the Act, as “the Supreme Court has made it clear that the results in all of the RLA cases would be the same under normal rules of statutory construction,” even though the original

dues objector cases.¹¹⁷ I find the Court's protection of constitutional rights under public sector law, as well as RLA jurisprudence, essential in turning the Act to the protection of the nonmember objector's Section 7 right to refrain from union activities.

III.

After *Beck*, a union has no authority to collect from objectors funds spent on nonrepresentational activities, and the collection of such funds is coercion per se, as it conditions employment on the satisfaction of an obligation that the statute does not authorize. The preceding analysis demonstrates that the appropriate standard for allegations that a union has violated *Beck* rights is the 8(b)(1)(A) prohibition of restraint and coercion of employees in the exercise of statutory rights. Further, when a union imposes a financial obligation on an employee without consent, i.e., when the employee is not a member of the union, the employee's right to refrain from *assisting* the union is inevitably infringed. I find that the rights to refrain from joining or assisting a union, within the limits of the 8(a)(3) proviso, are best served if they are accommodated in the same fashion the Court accommodated parallel rights in cases interpreting section 2, Eleventh and constitutional requirements. As those cases instruct, careful differentiation between chargeable and nonchargeable expenditures is necessary, as a union's collection of unauthorized funds coerces objecting employees and invades their Section 7 rights. Further, any restraint on an employee's exercise of statutory rights must be construed narrowly, and the same attention to fairness in dealing with employee obligations in public sector and RLA cases is applicable to cases under the Act.

This principle of careful differentiation has wide effects, as it opens the issue of "chargeability"—which union activities are "representational" and which are "nonrepresentational." The applicable standard must be clear and unambiguous: either a union is authorized to impose a given charge or it is not. Concerning the determination of whether specific union activities are chargeable, the Supreme Court has provided some rules, but they are far from exhaustive. The Court has, however, provided guidelines for the Board and courts and for unions constructing dues objector policies.

In *Beck*, the Court excluded from chargeability "activities unrelated to collective bargaining, contract administration, or grievance adjustment"¹¹⁸—the *Beck* trio. But, as noted above, the Court's analysis centered on the limits of the 8(a)(3) proviso. No question of what activities a union may require objectors to support was before the Court.

¹¹⁷ The *Beck* Court's turning to *Street* to interpret union authority under Sec. 8(a)(3) is highly significant, as *Street* articulates dues objector law under the RLA, and interprets the authority a bargaining agent may exert over objecting unit employees in a manner consistent with constitutional principles. The RLA has been held to involve state action in view of its preemption of the state's authority to legislate against union-security agreements. See *Beck*, 487 U.S. 735, 761.

¹¹⁸ 487 U.S. 735, 738.

Thus, we must turn to precedent under the RLA and public sector cases for guidance. As noted above, unions may charge objectors for the costs of collective bargaining, contract administration, and grievance adjustment,¹¹⁹ as well as for expenses incident to maintenance of its corporate or institutional existence that are reasonably necessary to the representative function.¹²⁰ A key post-*Beck* case amplifies our understanding of the limits on allowable charges, and how union expenditures may be analyzed.

In *Lehnert v. Ferris Faculty Assn.*,¹²¹ public sector objectors challenged expenditures for activities that occurred away from the bargaining table, but that, the union argued, strengthened its position in negotiations. The Court in *Lehnert* read *Hanson* and *Street* and their progeny as finding that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."¹²² The Court also held that unions may charge objectors for their

pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. . . . [But] [t]here must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization. And, as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses.¹²³

Lehnert's subject matter demonstrates that *factual differences* between public and private sector bargaining require sensitivity to the use of public sector precedent to differentiate between activities that support collective bargaining in the private sector and those that do not.¹²⁴ This difference might well affect the chargeability of, e.g., per capita payments to a national union in a case such as that at hand, in which the objector's unit is in the private sector, but the union represents numerous employees in the public sector, and even employees in Canada. The Supreme Court, based on the facts in *Lehnert*, decided that the per capita expenditure could, insofar as

¹¹⁹ *Id.* See also cases discussed in sec. II, A, *supra*.

¹²⁰ *Ellis*, *supra*, 466 U.S. 435, 448 ("Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence. . . .")

¹²¹ 500 U.S. 507.

¹²² *Id.* at 519.

¹²³ *Id.* at 524.

¹²⁴ The Court disallowed the lobbying expenditures at issue there because they did not relate to the ratification of an objector's bargaining agreement. It indicated that because public sector unions often sought ratification of collective-bargaining agreements in legislatures, lobbying in some cases would be chargeable to objectors. *Id.* at 519–520. No Supreme Court case has held that lobbying is a chargeable expense for a union representing employees in the private sector.

it supported representational activities, be charged to objectors. Thus, the chargeability of payments to affiliates is a question of fact, with the union bearing the burden of demonstrating that payments to affiliated organizations inured to the benefit of the objector's unit. Clearly, where an affiliate acts on behalf of employees working under another nation's sovereignty, that portion of the per capita payment could not be chargeable, as no benefit could inure to the objector's unit. In addition, a union would be required to marshal significant convincing evidence that payments supporting employees working in the public sector inured to the benefit of employees covered by the Act, as different economic regimes would apply. It is unlikely that the achievement, for example, of a favorable contract for a unit of public employees would benefit private sector employees, whose employment is subject to market forces rather than government decree.

Lehnert provides valuable guidance in determining the chargeability of union activities on which the Supreme Court has not ruled. Its three-part test—that expenses be germane to collective bargaining, that they be justified by the policy interests served by the authority to negotiate union-security provisions, and that they not unnecessarily burden key employee freedoms—is well adapted to cases under the Act. Where activities are germane to collective bargaining, but occur outside the objector's bargaining unit, determining whether the activity is justified by relevant policy interests and inures to the benefit of the objector's unit involves a factual test for, e.g., affiliation expenditures, or the cost of pursuing grievances in other units.

Thus, in light of our mission to create a structure for safeguarding employee rights under union-security provisions within Supreme Court precedent, I would find that, as a matter of law, any expenditure found nonchargeable by the Court in public sector or RLA cases is nonchargeable under the Act.¹²⁵ Conversely, I would follow Court precedent permitting unions to charge employees with expenses necessary for maintaining their existence as bargaining agents,¹²⁶ and where activity conducted outside the objector's unit ultimately inured to its benefit, I would permit a union to charge objectors their share of those expenses. Any activity on which the Court has not passed would be analyzed as a mixed question of law and fact, with the *Lehnert* three-part test as the legal measure and whether the circumstances of the specific case demonstrated that the expenditure resulted in a benefit to the objector's unit as the factual standard.

¹²⁵ See, e.g., *Ellis*, 466 U.S. 435, 451 (objectors may not be forced to subsidize the costs of portions of the union's publication that did not relate to representational activities, of organizing employees of other employers, or of some types of extra-unit litigation).

¹²⁶ *Id.* at 448 (objectors may be charged for the cost of conventions, social functions in which nonmembers may participate, and some types of litigation).

The result would vary according to the different practices of unions and their relationship to the units they represent.

I would find that, at a minimum, a union would avoid a finding that it had coerced employees in violation of Section 8(b)(1)(A) if its dues-objector policy conforms to the following requirements.

Notice

In specific terms, when a union seeks to obligate an employee to pay dues, fees, or their equivalent under a lawful union-security clause, such as when an employee is hired to work under a contract containing such a clause or when a contract containing such a clause is executed and applied to employees, it must provide written notice to each individual employee containing certain information. In addition, such notice must be provided not less than annually thereafter to each bargaining unit member.¹²⁷ This information must include notification that the employee has a right to

(a) become or remain a nonmember of the labor organization that acts as his collective-bargaining representative;¹²⁸ and to

(b) object to paying uniformly required dues, fees, or other assessments to support activities by his collective-bargaining representative other than the *Beck* trio.¹²⁹

In addition, a valid notice must

(c) reflect the percentage of funds expended, in its most recent fiscal year, by the labor organization on *Beck* trio representational activities in contrast to nonrepresentational activities, and set forth the major categories of expenditures by the organization, verified by an independent auditor,¹³⁰

¹²⁷ An annual notification requirement is essential since a labor organization's proportion of representational to nonrepresentational expenditures, and possibly its distribution of expenditures across major categories, is likely to change over time, and information provided previously thus becomes of no value in serving the purpose of the requirement. Analogously, the Supreme Court has noted that "§ 8(a)(3) protects the employment rights of the dissatisfied member, as well as those of the worker who never assumed full membership," and that "[b]y allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union." *Pattern Makers*, 473 U.S. 95, 106.

¹²⁸ *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 ("It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."); *Beck*, 487 U.S. 735, 745; *Marquez*, 525 U.S. at 37.

¹²⁹ *Beck*, 487 U.S. 735, 745.

¹³⁰ *Hudson*, 475 U.S. 292 at 306, 307 incl. fn. 18. In *Hudson*, the Court emphasized that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee," that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor" (*Id.* at 306; emphasis added); and that if a union charged objecting nonmembers for funds transferred to an affiliated organization, it was obligated to disclose how such funds were expended ("With respect to an item such as the Union's payment . . . to its affiliated state and national labor organizations, . . . either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of

(d) advise the recipient of his right to an advance reduction in required fees and dues by the same percentage the labor organization spends on nonrepresentational expenditures if the recipient becomes or remains a nonmember and objects to such expenditures,¹³¹ and

(e) apprise the recipient of any internal requirements governing registering objections to nonrepresentational expenditures, except that the labor organization shall impose no requirements other than that an objection be in writing and be mailed via first class mail to a particular address.¹³²

Challenge procedures

The Supreme Court recognized the right of an objecting nonmember to challenge a union's allocation of expenditures as chargeable or nonchargeable in *Ellis*, in which the Court passed on the nature of expenditures classified by the union as representational but which objecting nonmembers contended were wrongly charged to them.¹³³ In *Hudson*, the Court set out the principle that objectors who challenged the information provided by the union were

the share that was so used was surely required." Id.). *Hudson's* notice requirements were applied to the NLRA in *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 fn. 6 (D.C. Cir. 1995), on remand 23 F.Supp. 2d 47 (D.D.C. 1998); and *Penrod v. NLRB*, 203 F. 3d 41, 47 (D.C. Cir. 2000). See *Penrod* for discussion of requirement that unions provide information regarding the breakdown of payments made to affiliate organizations, id. at 46. See discussion of application of independent auditor requirement to NLRA in *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997).

¹³¹ See *Ellis*, 466 U.S. 435, 443; *Hudson*, 475 U.S. 292, 303–304; *Abrams*, 59 F.3d at 1380 (rebate approach inadequate; advance reduction permissible alternative); *Beck*, 487 U.S. 735, 745 (nonmembers may not be charged dues and fees for nonrepresentational expenditures); *Street*, 367 U.S. 740, 774 (objection must be made affirmatively known to union by employee because "dissent is not to be presumed.")

¹³² Thus, for instance, a union may not require that objections be filed only during specified "window periods" and may not require that objections be renewed on an annual basis. Nor may it impose arbitration or exhaustion of internal union processes requirements.

A "window period" is a limited period of time, often a particular month each year, which unions designate for acceptance of nonunion employees' notices of objection under *Beck*. Sec. 8(b)(1)(A) prohibits a union from failing to accord immediate effect to a written objection, and any dues collected after an employee has registered an objection would be compelled exactions coercing the nonmember objector in his right to refrain from assisting a union and would violate Sec. 8(b)(1)(A). See *Polymark Corp.*, 329 NLRB 9, 14 (1999) (Brame, concurring in part and dissenting in part).

In *Shea v. Machinists*, 154 F.3d 508, 515, the court rejected a union requirement that objectors renew their position on an annual basis, declaring that a continuing objection procedure least intrudes upon employee rights, whereas "the current annual objection procedure can interfere with an employee's exercise of his rights because if he fails to again object, he must pay the equivalent of full union dues and thereby support the unions' political activities."

See *Air Line Pilots v. Miller*, 523 U.S. 866 (1998), and discussion infra, fn. 135, for rejection of requirements that objectors use certain arbitration procedures to resolve disputes over the amount of reduction of dues and fees and to exhaust internal union processes. Also see *Schreiber Foods*, 329 NLRB 28, 34 (1999) (Brame, concurring in part and dissenting in part), discussing unlawfulness of requirement that objectors utilize internal dispute resolution mechanism).

¹³³ 466 U.S. 435. See text accompanying fns. 70–76 and fns. 125–126.

entitled to a procedure sensitive to the protection of their rights.¹³⁴ If an objector chooses to challenge the union's financial accounting, the choice of forum must remain with the employee. I would not find that a union coerces or restrains employees if it does not provide an internal dispute resolution procedure.¹³⁵ If, however, it chooses to do so, it would violate Section 8(b)(1)(A) if it required employees to satisfy a union-controlled dispute resolution procedure before access to a neutral arbitrator.¹³⁶ Further, if a union threatened employees that the failure to satisfy

¹³⁴ 475 U.S. 292. See fns. 78–86 and accompanying text.

¹³⁵ As noted above, in *Hudson*, the Supreme Court held that unions in the public sector must, as a condition of requiring objecting nonmembers to pay an agency fee, provide for "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. 292, 310. The Court found that the procedure at issue in *Hudson*, described above (see text accompanying fn. 84–85, supra), was defective in that it was not impartial—its "most conspicuous feature" was that it was "entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees." Id. at 308 (quoting *Hudson*, 743 F.2d 1187, 1194–1195 (7th Cir. 1984)).

In *Air Line Pilots v. Miller*, 523 U.S. 866, the Court considered, in the RLA context, whether a union's adoption of an arbitration process to comply with *Hudson's* "impartial decisionmaker" requirement obligates objectors to exhaust the union's internal process and pursue arbitration before filing a Federal court suit challenging the union's calculations. The court found that a union may not require an objector to exhaust internal dispute resolution procedures before going to court unless he has agreed to do so. Id. at 869. The Court found that despite the union's having set up the process "to comply with this Court's decision in *Hudson* rather than out of its own unconstrained choice," the *Hudson* requirement "aims to protect the interest of objectors by affording them access to a neutral forum in which their objections can be resolved swiftly; nothing in our decision purports to compel objectors to pursue that remedy." Id. at 876–877. The Court also noted that a union may have a genuine interest in avoiding multiple challenge proceedings, but, again, found that the employees had a weightier interest: "that [union] interest does not overwhelm objectors' resistance to arbitration to which they did not consent, and their election to proceed immediately to court for adjudication of their federal rights." Id. at 879 (footnote omitted). Thus, under the Act, *Hudson's* purpose of advancing "the swift, fair, and final settlement of objectors' rights," id. at 877, might well be accomplished either in an arbitral process known to objectors to be fair, if they agreed to participate in it, or through the administrative processes of the Board. It is far more important that employees be free from coercion in their choice of forum, as *Miller* requires, and in the fairness and neutrality of whatever forum they choose in which to raise their challenges, than that a union provide an internal forum that objectors will mistrust. Moreover, a union policy that imposed a unilateral rule on nonmembers would violate Sec. 8(b)(1)(A) under *Scofield*, 394 U.S. 423. See discussion in *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB at 34 (Brame, concurring in part and dissenting in part).

In this case, the Union's unfair labor practice is clear. Here, as in *Schreiber Foods*, "the Union indicated to [the objectors] that if they did not abide by the internal procedures, their interests would be prejudiced." Id., supra.

¹³⁶ *Hudson*, 475 U.S. 292, 308 (union's dispute resolution procedure flawed because it was controlled by union). See also *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368 (6th Cir. 1994), cert. denied 513 U.S. 1148 (1995) ("union cannot unilaterally impose a means of resolution, and deprive nonmembers of the use of other fora"); *Abrams v. Communications Workers*, 59 F.3d at 1382 (maintenance of facially invalid unilateral arbitration policy violates Sec. 8(b)(1)(A)).

such a process would prejudice their challenge, it would violate Section 8(b)(1)(A).¹³⁷ A union is clearly obligated to place all challenged amounts in escrow pending the resolution of the dispute.¹³⁸

IV.

This analysis should demonstrate how the majority's reasoning and result fall short of fully protecting employees from union coercion. Respecting the January version of the Union's dues objector policy, it is unexpected that the Union's requirement that objectors submit challenges by certified mail clearly coerced employees in the exercise of the right to challenge the Union's calculations of their proportional share and violated Section 8(b)(1)(A).¹³⁹ The Union's internal dispute resolution procedure just as clearly restrained and coerced employees in the exercise of *Beck* rights by threatening challengers that nonparticipation will compromise their right to pursue their challenges, and by imposing on employees a union-controlled prearbitral process for resolving the dispute.¹⁴⁰ As to the requirement in both the January and November *Beck* policies that objectors submit specific challenges to chargeable expenditures, I would find that it violates Section 8(b)(1)(A) because it coerces employees by burdening the right to challenge the Union's expenditures.¹⁴¹

With respect to the November *Beck* policy, I would find that the "General and Defense Fund Reserve" category violated Section 8(b)(1)(A). A "reserve fund" is not a characterization of an expenditure, but an account from

which, by definition, funds have not been disbursed. A "general reserve fund" is an account in which funds are accumulated for future disbursement on any expenses the Union may see fit. Thus, to require objectors to contribute to such a fund could, in essence, give the Union a blank check that it may use toward chargeable or non-chargeable expenses. This *Beck* clearly prohibits.¹⁴² Further, I disagree with the judge that "general reserve" is a term that reasonably would be clear to an employee. A union's use of confusing or unclear categories in financial disclosures clearly coerces employees by failing to accord them the type of disclosure of the basis for their reduced charges that *Hudson* and other cases contemplate. I would also find that the Union violated Section 8(b)(1)(A) by failing to provide the Charging Party with a breakdown of expenses pertaining to her unit, absent convincing evidence that the Union's policy of providing information respecting pooled expenditures accurately reflected as chargeable only those activities that inured to her unit's benefit.¹⁴³ I would find that the Union violated Section 8(b)(1)(A) by charging objectors for "extra-unit litigation," absent convincing evidence in the record that such litigation supported only representation of employees at arbitration, as the Union claims.¹⁴⁴

Finally, I would find that the Union violated Section 8(b)(1)(A) by failing to escrow the full amount of the Charging Party's dues and fees, because I find that *Hudson* plainly requires that a union place disputed fees in escrow.¹⁴⁵

V. Conclusion

The above discussion is intended to provide a structure for the analysis of cases involving allegations that a union has acted outside the authority granted in the Section

¹³⁷ *Schreiber Foods*, 329 NLRB at 34 (Brame, concurring in part and dissenting in part).

¹³⁸ *Hudson*, 475 U.S. 292, 310 (escrow of sums in dispute while challenges are pending is required to protect objectors' right to freedom from subsidizing unauthorized expenditures).

¹³⁹ Nor are there any exceptions to the judge's findings that the January policy's "charge and rebate" system and its failure to provide objectors a breakdown of expenses regarding the International and the local in a timely manner violated Sec. 8(b)(1)(A).

¹⁴⁰ See discussion in *Schreiber Foods*, 329 NLRB at 34 (Brame, concurring in part and dissenting in part). I disagree with the failure of the judge and the majority to address the lawfulness of the internal dispute resolution procedure. The majority ignores the chilling effect that the maintenance of a policy warning objectors that if they fail to pursue a meeting with union officials to "discuss" their challenge, they will be viewed as having dropped the challenge. I see little difference between the maintenance of such a policy, even when not enforced, and the maintenance of a facially unlawful no solicitation/no distribution rule in violation of Sec. 8(a)(1). See, e.g., *Brunswick Corp.*, 282 NLRB 794, 794-795 (1987) (maintenance of facially overbroad no solicitation/no distribution rule unlawful, even if rule not enforced). Further, the majority's response to the union's argument that to accept a general challenge would require it to place that challenger's dues in permanent escrow illustrates how futile pursuit of the internal union remedy would be: if the challenger fails to press forward to arbitration, the union's executive committee decides the challenge.

¹⁴¹ See *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB No. 12, slip op. at 13 (Brame, concurring in part and dissenting in part) (union's internal dispute resolution policy, which required that challenges "specify the precise nature of your objection and the exact dollar amount or percentage of our expenses which you claim is non-chargeable" was coercive on its face and violated Sec. 8(b)(1)(A)).

¹⁴² *Beck*, 487 U.S. 735, 751-752 ("Construing the statute in light of this legislative history and purpose, we held that although § 2, Eleventh on its face authorizes the collection from nonmembers of 'periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership' in a union, . . . this authorization did not 'ves[t] the unions with unlimited power to spend exacted money.' . . . Given the parallel purpose, structure, and language of § 8(a)(3), we must interpret that provision in the same manner" (citations omitted; emphasis added by Court)); cf. *Ellis*, 466 U.S. 435, 444 (In rejecting the use of a rebate system to protect dissenters from contributing to supporting nonchargeable activities, the Supreme Court noted that "the union cannot be allowed to commit dissenters' funds to improper uses even temporarily").

¹⁴³ *Lehnert*, 500 U.S. 507, 524:

We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. . . . [But] [t]here must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union.

See also fns. 122-125, *supra*, and accompanying text.

¹⁴⁴ *Ellis*, 466 U.S. 435, 454. (The expenses of litigation not "concern[ing] bargaining unit employees and [n]ormally conducted by the exclusive representative" are "not to be charged to objecting employees.")

¹⁴⁵ 475 U.S. 292, 310, especially fn. 23.

8(a)(3) proviso to negotiate union-security agreements as interpreted by the Supreme Court in *Beck*. My purpose here has been to ground the Board's standards in relevant Supreme Court precedent. As shown above, the Court has set forth clear guidelines regarding the limits on union authority under the Section 8(a)(3) proviso, and employee freedoms under Section 7 are best protected when it is understood that employment under the Act is governed by the same principles as the Court has developed for other categories of employees.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a trial at which we appeared and offered evidence and argument, the National Labor Relations Board has found that we violated the National Labor Relations Act. The Board has ordered us to post this notice at our office and, if Dameron Hospital Association is willing, at the location where the unit employees we represent are employed.

We give the employees we represent at Dameron Hospital Association the following assurances.

WE WILL NOT maintain, enforce, or publicize a policy regarding objecting nonmember service fee reductions which fails to provide for the immediate reduction in service fees upon receipt of a proper objection to the Respondent's expenditure of dues for nonrepresentational purposes pursuant to *Communications Workers v. Beck*, 487 U.S. 735 (1988).

WE WILL NOT maintain an objecting nonmember service fee reduction policy that requires employees to communicate with the Union by certified mail.

WE WILL NOT maintain an objecting nonmember service fee reduction policy that provides for a charge and rebate system delaying reduction of objecting employees' service fees.

WE WILL NOT maintain an objecting nonmember service fee reduction policy that requires employees to make specific as opposed to general challenges to our cost allocations.

WE WILL NOT refuse to immediately deposit the amount of the disputed fees into an interest-bearing escrow account, as provided for in our policy, upon receipt of an objector's specific or general challenges.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL amend our nonmember service fee reduction policy to delete any provision that fails to provide for the immediate reduction in service fees upon receipt of a proper objection.

WE WILL amend our nonmember service fee reduction policy to delete any provision that requires employees to communicate with the Union by certified mail.

WE WILL amend our nonmember service fee reduction policy to delete any provision establishing a charge and rebate system.

WE WILL amend our nonmember service fee reduction policy to delete any requirement that employees file specific as opposed to general challenges to the Union's cost allocations.

WE WILL deposit all service fees from Alexandria M. Stoppenbrink that are brought into dispute by her general challenge to the Union's cost allocations into an interest-bearing escrow account, including an amount equal to the interest that would have accrued had such payments been timely escrowed.

WE WILL publish and disseminate our amended nonmember service fee reduction policy.

OFFICE AND PROFESSIONAL EMPLOYEES INTER-NATIONAL UNION, LOCAL 29, AFL-CIO

Virginia L. Jordan, Esq., for the General Counsel.

James E. Eggleston, Esq. (Eggleston, Siegel & LeWitter), for the Respondent.

Gerald R. Lucey and Douglas N. Freifeld, Esqs. (Corbett & Kane), for the Employer.

Glen M. Taubman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on December 2 and 3, 1992, in Oakland, California. Posthearing briefs were due on February 29, 1993. The consolidated proceeding arose as follows.

Alexandria M. Stoppenbrink (the Charging Party), an individual, filed a charge docketed as Case 32-CB-3695 on July 29, 1991, against Dameron Hospital Workers' Association of Local 29, Office and Professional Employees International Union, AFL-CIO (Respondent or the Union). The Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint respecting the charge on November 17, 1991.

The Charging Party filed a second charge against Respondent docketed as Case 32-CB-3801 on January 10, 1992. On October 30, 1992, the Regional Director issued an order consolidating cases, amended complaint and notice of hearing consolidating the two cases. On November 12, 1992, the Regional Director issued an order consolidating cases, second amended consolidated complaint and notice of hearing consolidating a third charge: Case 32-CB-3990. That third case and the allegations in the consolidated complaint dealing with it were severed at the hearing and are no longer a part of the instant proceeding.

The amended complaint alleges that Respondent has violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by failing to conform in various ways with the requirements established by the Supreme Court in *Communications Workers v. Beck (Beck)*, 487 U.S. 735 (1988). Respondent generally denies its conduct has at any time been inconsistent with controlling law and raises various other procedural and substantive defenses.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel, the Charging Party, and Respondent, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

At all times material, Dameron Hospital Association (the Employer or the Hospital) has been a California corporation, with an office and place of business in Stockton, California, where it has been engaged in the operation of an acute care medical facility. The Hospital, as part of its business operations, annually derives gross revenues in excess of \$250,000 and annually purchases and receives goods or services directly from outside the State and/or receives payments from Medicare and Medi-Cal programs, both individually valued in excess of \$5000.

There is no dispute and I find that the Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union and Office and Professional Employees International Union (the International) are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Hospital is an acute care medical facility in Stockton, California, with the normal employee compliment associated with such institutions. The Hospital has at material times had a collective-bargaining relationship with the Union respecting a unit of approximately 300 employees. At all relevant times the Union and the Hospital have maintained a series of collective-bargaining agreements covering the unit including one effective on its face from October 7, 1989, to October 7, 1992. That agreement and its successor contain certain union-security provisions including an obligation that full-time unit employees make application to join the Union within 30 days from the date of employment.

The Union is an affiliated local of the International with offices in Oakland, California. The Union represents approximately 205 bargaining units in northern California and Nevada which range in size from 2 employees to 1900. Approximately 170 units have 10 or fewer employees. Two units have more than 200 employees: the Hospital unit and another unit containing almost 2000 employees. The represented units are generally clerical in the health care, insurance, distribution, and labor organization areas. One unit of approximately 50 employees is in the public sector. The International has numerous affiliated local unions throughout the United States and Canada. Locals, including the Union, remit portions of the dues and service fees they receive to the International, which in turn provides support and assistance to the locals.

¹ As a result of the pleadings and the stipulations of counsel, there were few disputes of fact. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

As is noted in detail, *infra*, Respondent maintained a policy respecting the handling of employees who objected to the payment of dues for nonrepresentational expenses in mid-1991 which policy was amended in November 1991. As part of its policy, Respondent prepares annual financial disclosures, which determine representational and nonrepresentational expenditures based on a single determination applicable to all units of the local. In making such calculations Respondent "pools" expenses.

Alexandria Stoppenbrink, the Charging Party, has been employed by the Hospital as a legal accounts representative, a position in the unit represented by Respondent and covered by the contracts described, *supra*, containing union-security provisions. Her husband is Ken Stoppenbrink, the Employer's director of personnel, who, *inter alia*, negotiates and administers the collective-bargaining agreement covering the Charging Party.

Alexandria Stoppenbrink had been a member of the Union until sometime in 1991. Thereafter she resigned, was sent a copy of the Union's policy and objected to the payment of service fees for nonrepresentational expenses. The Union also sent the Charging Party a copy of its "Chargeable Expense Report for the Year Ending December 31, 1991." By letter dated January 9, 1992, to the Union, the Charging Party objected generally to all Respondent's expenditures. The Charging Party continues to remit "service fees" in an amount determined by Respondent to cover its representational expenses. Respondent has declined to place in escrow the amounts disputed by Stoppenbrink, *i.e.*, the entire payment. No further procedural processing of the dispute between the Union and the Charging Party other than through the instant litigation has occurred.

B. Analysis and Conclusions

1. Preliminary matters

a. The Charging Party's bargaining unit status

Respondent contends on brief at 10:

The General Counsel has no standing to assert the claims in this proceeding because the only employee on whose behalf these claims may even arguably be asserted, Charging Party Stoppenbrink, cannot be considered as a bargaining unit employee because her interests are aligned with management by virtue of her spousal relationship and the confidentiality of spousal communications concerning bargaining unit employees and Union representational activities.

Respondent cites the Supreme Court's decision in *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985), for the proposition "that an employee may be properly excluded from a bargaining unit because of a family relationship with management without the necessity for a finding that the employee enjoyed special job-related privileges" (R. Br. at 11).

Counsel for the General Counsel asserts on brief at 23-24 that *Action Automotive* holds that the issue of the inclusion of close relatives in a unit turns on three factors: (1) whether the employee resides with and is financially dependent on the relative who owns or manages the business; (2) the degree to which the family member is involved in the management or ownership of the business; and (3) whether there are special working conditions or benefits resulting from the relationship. Applying these factors, the General Counsel argues that the Charging Party must be considered in the unit.

I do not accept the arguments of the parties on this issue as properly framed. Implicitly the issue as argued by the parties seems to be: What is the proper unit placement of the Charging

Party assuming the issue is both disputed and of first impression? Rather the issue, to the extent relevant, in my view is: What was the unit placement of the Charging Party at relevant times up to the time of the hearing? The distinction is that the parties seem to address what the Charging Party's unit status should have been. The issue as I see it is limited to what unit status the Charging Party actually had at relevant times.

Turning to the issue of the Charging Party's unit placement during the events under challenge, there is no doubt and I find that the Employer, the Union, and the Charging Party at relevant times believed and acted as if she were a unit member. Thus, the Charging Party was treated by the Employer as a unit member and the terms of the collective-bargaining agreement applied to her. The Charging Party had earlier in her employment become a member of the Union and thereafter resigned and sought to pay reduced dues under the union-security clause. Respondent has at all times treated her as if she were covered by the contract and the union-security agreement.² Irrespective of what unit placement might now be appropriate were the Employer, the Charging Party, the Union, or some combination thereof to seek her ouster from the unit, the narrow issue presented on these facts is: Could the parties properly include the Charging Party in the unit at relevant times? This question is easily answered in the affirmative. The parties by mutual agreement and practice have broad discretion under Board representation law to include a wide variety of employees in the bargaining unit. The Charging Party has at all times been a statutory employee and on this record is clearly such an "includable" employee.

Given all the above, I find that the Respondent's unit contentions respecting the Charging Party are not effective in contesting her unit status during the events in litigation. Her unit status during those times is the only representation issue relevant to the instant litigation. It is therefore unnecessary to rule on her unit placement at any time thereafter.

b. Are allegations respecting a superseded policy moot?

Respondent filed a Motion for Partial Summary Judgment and Supporting Brief with the Board on November 27, 1992, arguing, inter alia, that its June 15, 1991 policy had ceased to exist and was superseded by its November 20, 1991 revised policy. It contended that its June 15, 1991 policy was obsolete and invalid at the time the initial complaint issued in this matter and therefore the allegations involving the June 15, 1991 policy are immaterial and moot. The Board by Order dated November 30, 1992, denied the motion holding that the issues, including that described above, could best be resolved following a hearing before an administrative law judge and, further, finding that Respondent was not at that time entitled as a matter of law to a dismissal of the allegations.

Respondent has renewed its argument before me citing Board decisions involving settlements offered as a defense to asserted violations of the Act, *Greensboro News & Record*, 293 NLRB 1243 (1989), and *International Harvester Co.*, 199 NLRB 1009 (1972). Counsel for the General Counsel distinguishes those cases noting, inter alia, that no equivalent settlement involving either all the parties or a withdrawal of the charge is present in the instant case. She further argues that the

General Counsel's theory of a violation involves both Respondent's conduct under its policies and the language of the policies themselves. She argues the entire case is rooted in *Beck* and that Respondent's pre-November 20, 1991 conduct and policy may not be simply isolated from either the subsequent policy or subsequent events.

Considering the arguments of the parties and the record as a whole, I agree with the General Counsel that the pre-November 20, 1991 allegations remain ripe for decision and are not to be dismissed as a result of an earlier settlement. Respondent's assertions that the policy has been revised and that it was not applied in all the aspects under attack are not so susceptible to a single ruling. As a general proposition, the fact that an illegal policy has been revised is not, standing alone, a defense to a violation of the Act. Such arguments are more appropriately considered in fashioning a remedy for any violations found. To the extent Respondent's assertions in this area require further discussion, they are included in the analysis of individual allegations, infra. Given all the above, I shall not at this threshold stage of the analysis dismiss any of the allegations for the reasons asserted.

c. Is the General Counsel's complaint improper due to a previously dismissed charge in Case 32-CB-3483 or because of Respondent's argued reliance on Regional Office advice?

Respondent argues that portions of the instant case are similar to or identical to portions of an earlier charge in Case 32-CB-3483, which was dismissed by the Regional Director. Counsel for Respondent further asserts that the actions of Respondent alleged as improper in the complaint were undertaken at least in part on the advice of Board regional staff.

The General Counsel argues that the Board holds that the dismissal of earlier charges has no adverse effect on the litigation of otherwise proper allegations in timely charges. *Kelly's Private Care Service*, 289 NLRB 30, 39 (1988), and cases cited therein. This case is both current and determinative of the issue. Therefore, I shall not consider the dismissal of Case 32-CB-3483 or other aspects of its processing inasmuch as it is irrelevant to the disposition of the case.

Further, as noted by the General Counsel on brief at 21-22:

Board law is clear that "[t]he Board is not estopped from proceeding against a Respondent because of statements made by a Board Agent during the investigation of a charge." *Sumol Valley Gold and Recreation Co.*, 305 NLRB [545] (1992) (citing *Dubuque Packing I*, 287 NLRB 499, 542 n. 59 (1989). See also *Kuna Meat Company*, 304 NLRB [1005] n. 2 (1991); *Gladstone's 4 Fish*, 282 NLRB 1285 (1987).

Relying on the cited case, I reject Respondent's position that Board regional advice must be considered in determining if the Act has been violated.

2. Complaint allegations

a. Pre-November 20, 1991 allegations

Paragraph 10(a) of the complaint alleges that until November 19, 1991, Respondent had in effect a policy governing protests of dues payment for nonrepresentational purposes. Paragraph 11 of the complaint alleges that Respondent's policy failed to advise members of their full rights to object to the payment of dues for nonrepresentational purposes in violation of Section 8(b)(1)(A) of the Act as further alleged in the following subparagraphs:

² While there is evidence suggesting that there may have been some in futuro contemplation of removing the Charging Party from the unit, there is no evidence that such considerations rose to the level of consummation.

(a) failing to timely provide to objecting employees a breakdown of expenditures by the International and Respondent for representational and non-representational purposes;

(b) failing to immediately reduce the financial obligation of objecting employees by the proportion of monies that were used for non-representational purposes;

(c) requiring that employees transmit their objection by certified mail;

(d) requiring that objecting employees submit their objections to a "Resolution Conference procedure" before submitting employees objection[s] to arbitration;

(e) maintaining a "charge and rebate" system whereby the full dues of objecting non-members are held in escrow until the year's reduction is determined post hoc, and a rebate is then made, in lieu of immediately reducing the amount charged non-members;

(f) requiring that objecting employees make specific, as opposed to general, objections to "chargeable" expenditures listed in Respondent's annual "Chargeable Expense Report."

b. Post-November 19, 1991 allegations

Paragraph 10(b) of the amended complaint alleges that from at least November 20, 1991, Respondent has maintained in effect a revised policy governing protests of dues payment for nonrepresentational purposes. Paragraph 12 of the complaint alleges that the revised policy fails to advise nonmember and new employees of their *Beck* rights by "requiring that objecting employees make specific, as opposed to general, objections to 'chargeable' expenditures listed in Respondent's annual 'Chargeable Expense Report'."

Paragraph 13 of the complaint alleges that under its revised policy Respondent issued a financial disclosure for 1991 which includes a category for the International, "General and Defense Funds Reserve," which fails to provide objecting employees with sufficient information to decide whether to challenge this particular expenditure.

Paragraph 14 of the complaint alleges that under both Respondent's pre-November 20, 1991 policy and post-November 19, 1991 revised policy, Respondent has allocated its own and the International's representational and nonrepresentational expenditures on a respondent and international wide basis rather than on a bargaining unit by bargaining unit basis.

Paragraphs 15 and 16 of the complaint allege that on or about January 9, 1992, employee Alexandria Stoppenbrink objected generally to all "chargeable" expenditures listed in Respondent's "Chargeable Expense Report for the Year Ending 1991," but that at all times since that time, Respondent has failed and refused to place in escrow the full amount of the dues collected from Alexandria Stoppenbrink until such time as the objection is resolved.

3. Do the requirements of *Beck* apply to Respondent?

In 1988 the U. S. Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988), held for the first time that unions representing employees under the jurisdiction of the National Labor Relations Act who are covered by union-security clauses must make certain provisions so that employees who object to paying more than the actual cost of representation need not do so. The threshold issue is whether or not the requirements of *Beck* apply to Respondent as alleged in the complaint.

The amended complaint alleges that Respondent and the Employer at relevant times have maintained collective-bargaining contracts covering unit employees which contain union-security provisions requiring permanent employees as a condition of continued employment to "make application to join the Union within thirty (30) days from the date of employment" and to continue their union membership during unit employment. Further the complaint alleges that Respondent collects funds pursuant to the union-security clause and transmits a portion of those funds to its parent organization, the International, and that both Respondent and the International have expended a portion of the moneys received on nonrepresentational activities. The record amply supports these contentions which were not seriously controverted.

The Charging Party is not a member of the Union,³ but has paid moneys to Respondent during relevant times under the assumption she was obligated to do so by the collective-bargaining agreement. As discussed, supra, at relevant times the parties treated the Charging Party as a unit member with a union-security obligation and Respondent and the Charging Party have had various communications respecting her union-security obligations and the Union's administration of its dues objector policies with respect to her.

Based on all the above, I conclude that at relevant times Respondent was obligated to conform to the standards of *Beck* and that the Charging Party has standing to place the Union's conduct at issue through the filing of the underlying charges insofar as they are reflected in the amended complaint.

4. Respondent's pre-November 20, 1991 policy—complaint paragraph 11

The complaint at paragraph 11 attacks Respondent's pre-November 20, 1991 policy in various particulars. The 6-month period preceding the filing of the initial charge in this matter limits the reach of the complaint to times no earlier than January 29, 1991. Paragraph 11 therefore addresses conduct occurring on or between the dates of January 29 and November 19, 1991.

The parties stipulated that the Union has a policy in effect from at least May 1, 1991, entitled "Notice of Fee Payer Procedure." The parties did not dispute that the policy was sent to the Charging Party at the time of her resignation from the Union. Various of its provisions are attacked by the General Counsel as in contravention of *Beck* and in violation of Section 8(b)(1)(A) of the Act. Respondent, other than asserting the mootness arguments discussed, supra, does not address the bulk of the General Counsel's arguments where the arguments do not apply to the subsequent policy.

Complaint paragraph 11(a) alleges that Respondent did not timely provide to objecting employees a breakdown of expenditures by the International and Respondent for representational and nonrepresentational purposes. The pre-November 20, 1991 policy as relevant here provided that employees could file objections with the Union in December of each year. The policy further stated:

Section C.

Once your initial protest, or any later protest you wish to make, is recorded, this local union will send to you as soon after December 31 of the affected year as possible, a report of Local Union expenditures.

³ She resigned her union membership in 1991 before the filing of the charges here.

The pre-November 1991 policy is not specific respecting when the information would be sent. At issue in this complaint paragraph is what, if anything, was improper about the Union's actions respecting this element of the policy in the period January 29 to November 20, 1991.

Without reaching the General Counsel's citation of authority for the proposition that a union is obligated under the Act to provide objectors with timely information respecting expenditures, I do not find the factual record sufficient to find the Union's conduct respecting the Charging Party⁴ or any other employee was untimely. The record simply does not establish the specifics of the Union's response to the Charging Party. Insofar as the record indicates no other employee has been involved in the process. The factual support for the General Counsel is therefore not sufficient to sustain the prosecution's burden of proof with respect to the complaint subparagraph. I shall therefore dismiss this allegation of the complaint.

Complaint paragraph 11(b) alleges that Respondent did not immediately reduce the financial obligation of objecting employees by the proportion of moneys that were used for nonrepresentational purposes. Complaint paragraph 11(e) alleges that Respondent maintained a "charge and rebate" system whereby the full dues of objecting nonmembers are held in escrow until the year's reduction is determined post hoc, and a rebate is then made, in lieu of immediately reducing the amount charged nonmembers.

There is no factual dispute that the pre-November 1991 policy did not provide for immediate reductions in objector's payments or that the Union applied its policy as to A. Stoppenbrink. In *Beck*, the Court held that its prior cases under the Railway Labor Act would be applicable to *Beck* issues under the Act. In *Ellis v. Railway Clerks*, 466 U.S. 435, 443-444 (1984), the Court found such a "charge and rebate" system under the Railway Labor Act improper. See also *Hudson v. Chicago Teachers Local 1*, 475 U.S. 292 (1986), and *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990). It follows that any union policy which delays a reduction in objector payments violates the Act. The policy violates the act irrespective of whether or not employees filed objections in the relevant period because such a facially restrictive policy may well discourage employees from freely exercising their right to become objectors. I therefore sustain complaint paragraphs 11(b) and (e).

Complaint paragraph 11(c) alleges that Respondent required employees to transmit their objections to the Union by certified mail. Respondent's policy provides, inter alia:

Section D.

When you have received these reports [of local union expenditures] from this local union, we hope you will agree that the allocation into representation and nonrepresentation has been correctly made. In the event you do not agree, you are entitled to protest further, also by certified mail to this location, within 21 days of the mailing of this report by the local union to you.

⁴ The Charging Party's January 9, 1992 letter to the Union recites that she was in receipt of a December 12, 1991 letter from the Union "and the single page of numbers that you call a 'financial report'."

Section H.

In the event any protest you make is not resolved by the above procedure, you will be entitled to file a notice of arbitration by certified mail to the local union office within seven calendar days.

The General Counsel argues on brief at 14-15 that a requirement that employees utilize certified mail at any stage of the dues objector process is impermissible as an unreasonable burden on employees' rights citing cases dealing with employees' right to resign from a union. While those cases deal with a different right, they make it clear that a union requirement that an employee utilize certified mail is not designed to benefit the receiver of the communication, i.e., the union, but rather to place a burden on the sender, i.e., the employee.

In *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1046-1047 (6th Cir. 1991), the circuit court struck down a certified mail requirement for filing of a dues objection request in the public sector. While the court found the certified mail requirement a "minor burden," it further found such a burden impermissible because it was simply "unnecessary."

Weaver and the other cases cited by the General Counsel are persuasive. A requirement that the employee utilize certified mail is of no utility to the Union, but, to at least a degree, burdens the employees' exercise of their rights. Therefore I find that a requirement that any dues objector communication be submitted by certified mail is a needless and impermissible impediment to the employee's exercise of *Beck* rights which are also Section 7 rights. A procedural impediment to the exercise of Section 7 rights which has no balancing utility to the union is clearly arbitrary and a violation of the union's duty to fairly represent employees. Accordingly, I sustain the General Counsel's complaint paragraph 11(c) and find that Respondent's requirement that dues objector communications be submitted by certified mail as described in its pre-November 20, 1991 policy violates Section 8(b)(1)(A) of the Act.

Complaint paragraph 11(d) alleges that the Union improperly required that objecting employees submit their objections to a "Resolution Conference procedure" before submitting employees objection(s) to arbitration. The Union's pre-November 20, 1991 policy provided for initial employee objection, union disclosure of its expenditures to the objecting employee, and subsequent employee protest of expenditures. The policy then provided:

Section F.

As soon as this local union receives your protest of any specific expenditure, it will notify you by certified mail that it has scheduled a Resolution Conference with you within no less than 30 days after receipt of your protest. A conference will be held at the local union office at a time within this 30-day period that is reasonable. If the local union fails to schedule this Resolution Conference within 30 days at a reasonable time, you will be entitled to move to the next level of this procedure. In the event you fail or refuse to appear at such Resolution Conference within this period, it will be considered that you have withdrawn your protest and no further action will be taken.

Section G.

At this Resolution Conference, the local union will undertake to explain to you the purposes and benefits of the

expenditure to which you have objected. It is hoped that this explanation will be sufficient to resolve the matter.

Section H.

In the event any protest you make is not resolved by the above procedure, you will be entitled to file a notice of arbitration by certified mail to the local union office within 7 calendar days of the completion of the Resolution Conference.

Section I.

An impartial arbitrator will be chosen as soon as possible thereafter.

In support of this allegation the General Counsel argues on brief at 17:

General Counsel contends that this is an invalid requirement as it merely refers an objector to the same party who originally made the breakdown of expenditures into representational and non-representational categories. It is one more impediment to a non-member's right to assure that the 'service fee' which is required is to be paid accurately states the amount of the representational cost borne by Respondent. Thus this requirement is violative of Section 8(b)(1)(A).

The Charging Party argues that nonmembers may not be required to exhaust internal union requirements including fee procedures in order to challenge them citing, *inter alia*, *Hudson v. Chicago Teachers Local 1*, 743 F.2d 1187, 1194 (7th Cir. 1985), and *Tierney v. City of Toledo*, 917 F.2d 927, 939-940 (6th Cir. 1990). Counsel for the Charging Party argues on brief at 32: "In short, Local 29's internal union 'exhaustion' provisions, which require the personal [underlining in original] appearance of the non-member at the union office, are per se coercive, burdensome and illegal."

There is no record evidence that the Charging Party or any other employee filed an expenditure protest in the pre-November 1991 period. Thus, the attack on the policy is facial and not directed to an actual application by the Union of the Resolution Conference procedure to delay or defeat a particular employee protest. Further, since the policy in the procedural steps both before the Resolution Conference and thereafter required an employee to communicate with the Union by certified mail—a requirement found impermissible, *supra*, the pre-November 1991 policy's procedures are invalid for other reasons.

Given all the above, I do not intend to further address the Union's pre-November 20, 1991 policy's step-by-step procedures which I find the record does not suggest were ever utilized and which have been found invalid by virtue of the inclusion of the certified mail requirements discussed, *supra*. The policy as written was invalid. It has now been replaced with a new policy which does not contain the language under attack in complaint paragraph 11(d). I shall therefore not rule further on complaint paragraph 11(d).⁵

⁵ Were it necessary to deal with the policy's Resolution Conference requirement free from the included tainting certified mail requirements, the issue would not in my view be simple or free from doubt. The General Counsel's challenge is to the policy on its face without any suggestion that such a procedure had been used improperly to harass employees or delay their challenges to representational cost allocations. As is discussed in depth elsewhere in this decision, *Beck* rights are not to be lightly impeded and the Resolution Conference is clearly an intermediate step lengthening the employees procedural track to relief.

Complaint paragraph 11(f) alleges that the Union improperly required objecting employees to make specific, as opposed to general, objections to "chargeable" expenditures listed in Respondent's annual "Chargeable Expense Report." This complaint paragraph is similar to the allegations of paragraph 12 of the complaint addressing the November 20, 1991 revised policy and will be addressed, *infra*, in conjunction with it.

5. The requirement that "Specific" objections be made to expenditures—complaint paragraphs 11(f), 12, 15, and 16

Complaint paragraph 11(f)—as to the pre-November 20, 1991 policy—and paragraph 12—as to the post-November 20, 1991 policy—allege the Union improperly required employees to make "specific" objections to the Union's allocation of expenses in its annual report. Complaint paragraphs 15 and 16 allege that the Charging Party in January 1992 objected to all "chargeable" expenditures in Respondent's 1991 report, but that the Union thereafter failed to place in escrow the full amount of dues collected from her.

The pre-November 20, 1991 policy addressed the rights of employees who had initially protested and thereafter received a report from the Union. Sections D, and E, stated:

Section D.

When you have received these reports from this local union, we hope you will agree that the allocation into representation and non-representational purposes has been correctly made. In the event you do not agree [with the report], you are entitled to protest further . . . within 21 days of the mailing of the report by the local union to you. You must indicate what particular expenditure you protest. A failure to identify a specific expenditure as objectionable will be considered as a waiver of any objection to that expenditure.

Section E.

As soon as this local union receives your protest of any specific expenditure, it will promptly deposit the amount under protest in an interest-bearing escrow account with a responsible financial institution, and make such deposits each month thereafter until the dispute is resolved.

The November 20, 1991 revised policy retained the quoted language in a different format but without essential difference.

In her letter dated January 9, 1992, to the Union the Charging Party stated in part:

I reaffirm my objection to all [emphasis in original] expenditures that are listed in your "financial report," because you bear the burden of proving which are properly chargeable to me and which are not.

The Charging Party in her letter generally argued the Union's dues objection provisions were inadequate and asserted that she

Yet, as is also noted elsewhere in this decision, employee understanding of the meaning and the full implications of the Union's annual financial disclosures is not automatic. Misunderstandings could easily arise and questions present themselves. The stated rationale for the Resolution Conference is to allow the Union to explain the disclosures to the challenging employee with the hope that with greater employee understanding agreement would be reached and further conflict avoided. Such a rationale does not fall of its own weight where no evidence of union misuse exists. Further, to the extent such procedural steps work to enhance the possibility of resolution or simplification of the matters in controversy they serve a clear public good.

did not wish to participate further in the procedures established by the policy including its arbitration provisions.

Since receipt of the Charging Party's January 9, 1992 letter the Charging Party has continued to pay moneys to the Union and Respondent has not deposited the "full amount of the dues collected" from the Charging Party in an escrow account.

The General Counsel argues that the Union's requirement that employees challenge specific aspects of its financial disclosure and allocation reports in order to preserve their rights to obtain review is unreasonable and unnecessarily fetters the employees' rights to obtain review as required by *Beck*. The Charging Party emphasizes the fact that the burden of establishing representational expenditures is on the Union not the objecting employee.

The Union does not dispute the general proposition that a union must escrow disputed funds pending resolution of the dispute. The Union argues first that its policy requiring specific objections is reasonable and within the law. If the employee chooses not to make such specific objections, then there is no true dispute, which would require escrow. Second, in the specific case of the Charging Party, Respondent asserts it was further privileged not to consider her challenge as requiring escrow of all the service fees she tendered because she had, in the same communication raising the general rather than specific challenge, also rejected all means of resolving any dispute which existed. Thus, Respondent argues, since the Charging Party refused arbitration in her January 1992 letter, the putative dispute could never be resolved and any escrow of funds would have been perpetual.

The General Counsel answers Respondent's second argument as follows on brief at 23:

General Counsel contends that at best this argument is untimely. Here there is no question raised as to whether Respondent would have to suffer the ignominy of perpetual escrow because it chose to escrow nothing. Thus, there is no present dispute upon which to base this argument.

....

Respondent is required to escrow all of the monthly service fee until such time as the disputes are resolved, or until the objector does not proceed to resolve the objections at which time Respondent could remove the funds from escrow.

The initial question in my view is whether or not the requirement of a specific as opposed to general challenge to a union's expenditure allocations is a reasonable limitation on an employee's *Beck* rights. For the following reasons I find it is not. First the information disclosed to the employee is technical and in a form prepared by the Union. As I have found elsewhere in this decision, the Union need not be so detailed in its presentation of its calculations so that the employee is able to determine in a final sense whether the fee is correct, but only whether to object. *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991). Given that the Union is not obligated to make broad detailed self explanatory disclosures, it may not hold employees to have achieved a sufficient understanding of the Union's financial allocations so as to make specific objections respecting its provisions.

Second, the burden of proof respecting the establishment of representational expenses is indisputably on the Union. An employee should, in effect, be allowed a general denial where

he or she bears no responsibility to prepare or prove the facts which are asserted against him or her. The Union's financial disclosure and an employee's challenge are analogous to pleadings in litigation. The duty to plead affirmatively normally attaches to those possessed of the facts or bearing the burden of proof in law. Thus, the respondent in answering a backpay specification under the Board's Rules and Regulations Section 102.54(b) and (c) must plead specifically under risk of adverse findings because of respondent's knowledge of the underlying facts and because the burden of proof as to important aspects of the specification lie with respondent. In a normal unfair labor practice case where the General Counsel bears the burden of proof and where the facts are not peculiarly known to a respondent, Board Rule 102.20 permits general denials.

I find therefore that Respondent's policy requirement is unreasonable and improperly limits employees' *Beck* rights. Accordingly, I find it violates Section 8(b)(1)(A) of the Act as alleged in complaint paragraphs 11(f) and 12.

Turning to Respondent's second defense that the Charging Party in effect rejected the entire union dispute resolution procedure by rejecting arbitration, I agree with the General Counsel that the question has not ripened. When, and if, Respondent accepts the Charging Party's challenge as putting the entire 1991 disclosure in issue, it will have standing to raise the question.⁶ The Union's failure to fulfill its duty of fair representation respecting the Charging Party, as found has precluded that circumstance from arising to date.

I find therefore that Respondent's refusal to escrow the Charging Party's full-service fees after its receipt of the Charging Party's January 9, 1992 letter, until such time as her challenge to the Union's 1991 financial allocation was resolved, violated the Act as alleged in paragraph 16 of the complaint.

6. The adequacy of the 1991 union financial disclosure category: "International General and Defense Funds Reserve"—complaint paragraph 13

Complaint paragraph 13 alleges that Respondent's 1991 financial disclosure category for the International: "General and Defense Funds Reserve" fails to provide objecting employees with sufficient information to decide whether to challenge the expenditure. The Charging Party as an objecting unit employee was sent the 1991 report. The challenged category constitutes approximately 15 percent of the International's total expenditures (proportionally \$36,715 out of \$239,971) and approximately 3 percent of the Union's total expenditures (\$36,714 out of \$1,151,762).

Respondent explained the category as resulting from differing fiscal years between the entities as follows:

The category on the expense report reflects the portion of Local 29 affiliation fees paid to the International Union which are not expended by the International during the accounting year. Rather this portion of Local 29's affiliation fees constitutes a part of the International Union's general and defense funds surplus for the accounting year which is held in reserve for expenditure by the International in subsequent years. As a

⁶ My findings are not intended to disturb the proposition that a refusal to participate in a proper procedure may rise to the level of a waiver of rights. If an employee, including the Charging Party, simply refuses to participate in a proper step in a not otherwise flawed procedure, the labor organization may well be free to declare the dispute or challenge abandoned and end the escrow. The portion of the General Counsel's brief quoted above is not inconsistent with this principle.

result, it is impossible to state whether future year expenses from this surplus/reserve will be chargeable or non-chargeable until the expenditures are actually made. The status of these expenditures as chargeable or non-chargeable will be noted in the expense report for the accounting year in which these surplus/reserve funds are actually expended.

The General Counsel and the Charging Party argue that there is an undisputed obligation on the part of a union under *Beck*, 487 U.S. 735 (1988), and *Hudson v. Chicago Teachers Local 1*, 475 U.S. 292, 306 (1986), to give potential objectors sufficient information to understand the Union's calculation of its fee. Respondent argues first that there is no true matter at issue since only the Charging Party is a unit employee, nonunion member and that she has generally objected to Respondent's entire financial disclosure. Second, Respondent argues that the title "reserve" on the category is an unambiguous label in accountancy and should not require additional explanation.

A relevant starting point for the analysis is the Fourth Circuit's analysis in *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991):

The test of adequacy of the initial explanation to be provided by the union is not whether the information supplied is sufficient to enable the employee to determine in any final sense whether the Union's proposed fee is a correct one, but only whether the information is sufficient to enable the employee to decide whether to object. If the employee objects, the Union will be called upon to demonstrate more completely its justification for the fee because "the burden of proof in establishing the charges validly chargeable rests with the Union." [Citation omitted.]

Relevant to the Union's argument that the Charging Party did not need information to object, the Seventh Circuit noted in *Gilpin v. State County Employees AFSCME*, 875 F.2d 1310, 1315 (7th Cir. 1989):

Since to file a challenge costs only [postage], plus a small amount of time to supply the amount of information that the challenge must set forth, one would not have thought a challenger needed a detailed prospectus . . . before filing.

Considering the arguments of the parties and the cases advanced, I find that Respondent's 1991 financial disclosure was not in violation of Section 8(b)(1)(A) of the Act for failing to be more specific with respect to the International General and Defense Funds Reserve when providing that report to the Charging Party as noted above. Given the quantum of funds involved and the unambiguous meaning of the term "reserve," I find the category was sufficient to allow employees to form an opinion as to whether to object or not as described in the cited cases. Accordingly, I shall dismiss this element of the complaint.

7. The allocation of representational expenses on a local and international rather than unit-by-unit basis—
complaint paragraph 14

Complaint paragraph 14 alleges that under both Respondent's policies representational expenses are allocated on a "Local-wide and International-wide" basis rather than on a bargaining unit by bargaining unit basis. Respondent's 1991 Chargeable Expense Report makes it clear that Respondent has created an accounting system containing 10 expense categories which are allocated between "non-chargeable" and "chargeable" expenses. One of the Union's categories is entitled "legal

and professional"⁷ all of which is deemed to be chargeable as representational expense. Yet another local category addresses payments to the International. This category is allocated on the basis of a separate 10-category accounting system which similarly allocates chargeable and nonchargeable expenses of the International.

Counsel for the General Counsel argues that representational expense allocations must be made with respect to each individual bargaining unit citing the Supreme Court's decision in *Ellis v. Railway Clerks (Ellis)*, 466 U.S. 435 (1984). The General Counsel points out that the Court in first addressing and discussing what are termed *Beck* rights herein referred to "the bargaining unit," "the relevant unit" and the "collective bargaining unit" (*Ellis*, supra at 447-488, 488 and 452), rather than to the union as a whole in discussing expense allocation. The General Counsel argues that the Court in *Beck* relied on *Ellis* and therefore carried this standard to cases under the National Labor Relations Act. The Charging Party adds on brief that the individual bargaining unit as the fundamental representational entity is enshrined in the Act, the Board's regulations and the case law. Counsel for Respondent on brief argues that the concept of "pooling" is both practically necessary for trade unions and is sanctioned in law.

As discussed by the parties, the Fourth Circuit in *Crawford v. Airline Pilots Assn.*, 870 F.2d 155, 158-159 (4th Cir. 1989), authorized national rather than unit-by-unit expense calculation under the Railway Labor Act. The 10th Circuit in *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991), reached the same conclusion.

An important case on the issue which was cited by all the parties is the May 30, 1991 decision of the Supreme Court, *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). In that case the Court, addressing *Beck* issues in the public sector, allowed allocation of extra unit expenditures—that is expenses calculated on a larger than unit-by-unit basis including expenses not directly of benefit to the objector's particular unit—as representational expenses to members of particular bargaining units who did not receive immediate or direct benefit. Litigation expenses were not held to be susceptible to pooling however.

I have considered the arguments of the parties and the cases cited. The cases, including *PAID* which relied on *Lehnert* in reaching its result, convince me that the Supreme Court allows agglomeration and averaging to determine a single determination to apply to all collective-bargaining units. I also find that it may be fairly concluded that the standards under *Beck* and the National Labor Relations Act are at least no more rigorous than those established by the courts for the public sector unions and unions under the Railway Labor Act. I therefore conclude this same license is appropriate under the Act. Accordingly, I find there is no breach of a union's duty of fair representation as enforced by the Board under Sections 7 and 8 of the Act when a union does not calculate *Beck* dues allocations on a bargaining unit by bargaining unit basis, setting aside the issue of litigation expenses discussed infra.

As the General Counsel has argued on brief at 33, the circuit court's decision in *PAID v. Airline Pilots Assn.*, supra, while

⁷ The report describes the category as:

[F]ees to attorneys, arbitrators, court reporters and other expenses related to representation of employees covered by Collective Bargaining Agreements.

finding pooling appropriate generally, found it impermissible for litigation expenses relying on *Lehnert*. As noted the Union has a general category of "legal and professional" expenses which it held totally chargeable as a local union representational expense. This category is clearly "pooled." Thus, I find the Union has pooled litigation expenses. Under the cases cited, I find such litigation expense pooling is impermissible and violates the Act.

Summarizing the above with respect to paragraph 14 of the complaint, I find that as to all matters save litigation expenses, Respondent has not violated the Act by making a single local and single International representational expense allocation. To this extent the allegation will be dismissed. Respecting litigation expenses, Respondent has improperly pooled such expenses. This has resulted in the unit herein, including the Charging Party, improperly being allocated extra-unit litigation expenses. Such allocations are impermissible and violate Section 8(b)(1)(A) of the Act and I so find.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In directing the remedy, I have considered the fact that the pre-November 20, 1991 policy has been revised.

Respondent shall deposit in an appropriate escrow account all service fees received from the Charging Party which were the subject of her general objections including an amount equal to the interest such sums would have accrued, if they had been deposited within 2 weeks of the date of receipt by the Union.

Respondent will amend its service fee objector policy to eliminate any and all of the following:

Any requirement that objectors communicate with the Union by certified mail;

Any requirement that employees make specific as opposed to general objections to union representational cost allocations;

Allocations of extra unit litigation expenses as representation expenses.

Respondent shall reissue its amended policy publishing and disseminating it to the extent its earlier policy has been publicized and disseminated.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act by engaging in the following acts and conduct:

(a) Maintained a policy respecting service fee reductions for objecting unit employees until November 20, 1991, which:

(i) Failed to immediately reduce the financial obligation of objecting employees by the proportion of moneys that were used for nonrepresentational expenses.

(ii) Required employees to communicate with the Union by certified mail.

(iii) Provided for a charge and rebate system delaying reduction of objecting employees service fees.

(b) Maintained a policy respecting service fee reductions for objecting unit employees both before and after November 20, 1991, which:

(i) Required employees to make specific as opposed to general objections to the Union's representation cost allocations.

(ii) Allocated as representational expenses extra-unit litigation expenses.

(c) Failed and refused to place into an interest bearing escrow account the service fees received from the Charging Party following her general objection to Respondent's representation allocation calculations.

4. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[Recommended Order omitted from publication.]